

EXHIBIT A, pg. 12

09/641,410 GAU 1794 (REPLY TO NFOA) KIELY 105

JAN-16-2009 07:04P FROM:DANIEL KIELY 9142456661

TO:15712738300

P:17/23

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

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"composite material candy bar" is not sufficient for a prima facie case of rejection under 35 USC 132(a), and is moot. Applicant's original claims 6, 19-23 recite: "wherein said support comprises a composite material." Drawings, the terms "composite support 62, 62A... Milky Way Bar, Snickers Bar, etc.," "composite candy bar" throughout the specification, and PTO date stamped disclosure documents 1994, 1996, 1999 showing and testing of composite material candy bars, is direct and factual evidence of a support comprising "a composite material." Examiner has failed to satisfy its burden to articulate a prima facie case. Without adequate evidence of the basis of this rejection, the burden to rebut this rejection with evidence and/or argument has not yet shifted to Applicant. Applicant has evidence in the original claims and in the specification. Examiner does not show sufficient evidence to the contrary.

N.B. Reading the specification shows a "composite material candy bar."

[0195] A list of some suitable supports, are as follows:

[0196] composite candy bar with caramel, whipped chocolate nougat which is dipped in chocolate

[0197] composite candy bar with an elongated cookie stick, with caramel on top of the caramel, which is then dipped in chocolate

[0199] composite candy bar with chocolate, nuts and nougat inside

See MPEP section 2164. "Furthermore, when the subject matter is not in the specification portion of the application as filed but is in the claims, the limitation in and of itself may enable one skilled in the art to make and use the claim containing the limitation. When claimed subject matter is only presented in the claims and not in the specification portion of the application, *the specification should be objected to for lacking the requisite support for the claimed subject matter using Form Paragraph 7.44.* See MPEP § 2163.06. This is an objection to the specification only and enablement issues should be treated separately." 2163.06: "The claims as filed in the original specification are part of the disclosure and therefore, if an application as originally filed contains a claim disclosing material not disclosed in the remainder of the specification, the applicant may amend the specification to include the claimed subject matter."

Examiner thus admits that the terms "composite support 62," and "composite support 62A..." is interchangeable, or one in the same, for the term "composite material support 62, 62A..." or otherwise would have asked for a correction of the specification in the first office action in view of original claims 6, 19-23, and all the recitations of composite support 62 and "composite candy

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JAN-16-2009 07:05P FROM: DANIEL KIELY 9142456661

TO: 15712738300

P: 18/23

Appn. Number 09/641,410 (Kiely)

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Amendment A

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bar comprising the ingredients of caramel, whipped nougat," etc. See: [0195, 0196, 0199] above, i.e. material not components, and replete with descriptions of composite support Snickers Bar, Milky Way Bar, Baby Ruth Bar throughout the specification, as above. These candy bars are known to one skilled in the art, and notably to an examiner in the required field, to comprise a "composite material." MPEP section 2164 recites: "When claimed subject matter is only presented in the claims and not in the specification portion of the application, the specification should be objected to for lacking the requisite support for the claimed subject matter using Form Paragraph 7.44." Examiner had NOT objected to the specification, and thus concurred. (see also 2111 Claim Interpretation i.e. *consistent with* the specification) The evidence is overwhelming that Examiner(s) were well aware that applicant was claiming a composite material. Examiners did not object to name brand composite candy bars found in a grocery store in the specification. Examiner did not object to the specification in view of all claims that recited "a composite support" in the independent claims and only added components in the dependent claims, such as "a composite support... *further including a mess guard, a drip guard, a lollipop.*" Having all claims written as such, examiner had failed to fulfill its burden to identify the support of the application, and having made no requirement for applicant to change the wording of the specification "composite support 62, 62A..." thus understood the meaning of composite support to mean composite material support, such as Milky Way, Snickers, etc. Examiner is required to have come to understand the claims before the first office action.

N.B. → MPEP Examination

→ The term "bar" is a single component. As known to one skilled in the art, a "composite candy bar" is a composite material. As above, Examiner's argument claiming "new matter" is moot. Without adequate evidence of the basis of this rejection, the burden to rebut this rejection with evidence and/or argument has not yet shifted to Applicant. Examiner does not have sufficient evidence to the contrary.

Applicant therefore respectfully requests reconsideration and allowance of the amendments to the specification.

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material which is not supported by the original disclosure is as follows: the addition of "composite material" in paragraphs [0043], [0044], [0164] and [0166], which was not disclosed in the specification as originally filed and has also been added to claims. The term "a composite material" as disclosed in the amendment would introduce new matter and change the description from "a candy bar" to "a composite material candy bar" in paragraph [0164], which is not the same as a generic term "candy bar" as originally described. Therefore, the amendments to the specification introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

Amendment to paragraph [0197], correcting a typographical error and replacing "caramel on top of the caramel" with "caramel on top of the cookie caramel" does not introduce any new matter and would be entered if submitted separately.

Applicant's comment about cancelling the request to amend paragraph [0172] of the specification, is unclear as the applicant has not provided details of the original request to amend paragraph [0172] and any details as to whether the amendment was entered or not. Further, the record indicates applicant has request to amend paragraph [0171] but not paragraph [0172]. Applicant is requested to furnish more details about the date of submission, page number, paragraph etc., of the original request to amend paragraph [0172] for consideration.

Claim Rejections - 35 USC § 112 (First paragraph)

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims (all pending) are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which

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was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. In the instant case the term "composite material" as added to the claims introduces new matter as the term is not disclosed in the original disclosure and the introduction of the term "composite material" changes the description of "a candy bar" to "a composite material candy bar", which is not the same as a generic term "candy bar" as originally described. Other similar changes have been made throughout the claims, which are not supported by the original disclosure. Therefore, the amendments to the claims introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

Note: To expedite prosecution applicant is once again requested to furnish support for the newly added terms and phrase and subject matter recited in the new and amended claims in the current application. Furthermore, the applicant is requested to provide support where the claimed term or phrase is recited in the same context as it is being claimed.

Claim Rejections - 35 USC § 112 (Second paragraph)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 383-402 are rejected under 35 U.S.C. 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims are unclear for the recitation of "comprising a material comprising "two ingredient materials", "single component", "constituent ingredient materials" as it is unclear as to what is encompassed by the terms "ingredient" and "material" and "ingredient material"

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5/2/2002

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1794

This application contains a myriad number of species or inventions (depending on how one looks at them) and the follow restriction/election is made.

This application contains claims directed to the following patentably distinct species of the claimed invention: Species I, wherein the comestible is frozen

Species II, wherein the comestible is non-frozen

In addition, beside electing Species I and II, the following election of support is required :

Species III wherein the support is malleable

Species IV wherein the support is non-malleable

Depending on which species ^{is} of support, elected, If the non-malleable species is elected, a further election is required between:

Species IVa, wherein the support is a candy bar

Species IVb, wherein the support is a cookie bar

Species IVc, wherein the support is a granola bar

It is noted that two species/inventions of support ingredients are recited (i.e. claims 25&26). Presumably, they are mutually exclusive and are associated with either Species III or IV.

Thus, wherein the support is:

Species x, dextrose, malt dextrine, etc.

Species y, marshmallow

Species z, licorice

In addition, and, again presumably as a function of the type of confection (i.e. non-frozen or frozen), applicant is required to elect one of the following:

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For the record, applicant has not specifically addressed the election of species set forth in the Office action mailed 5/2/02, paper no. 7. Ordinarily, applicant is required to elect one or more species. There is no statement that an election was not made since the amendment presents a group of claims to which the election is no longer relevant. However, this does seem to be the case.

In view of the presentation of the new set of claims in the amendment filed 6/5/02, paper no. 8, the election in paper no. 7 is withdrawn in favor of the following new election:

This application contains claims directed to the following patentably distinct species of the claimed invention:

Species I, wherein the comestible has a support as shown e.g. in Fig 1, or

Species II, wherein the comestible has a plurality of supports as shown e.g. in Fig 35-39,

and

Further, election is also required between

Species III, wherein the support is a composite support, as shown e.g. in Fig 1, or

Species IV, wherein the support is a homogeneous support as shown e.g. in Fig 3

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, no claim is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election

EXHIBIT B, pg. 3a

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KIELY III

Notice of References Cited				Application No. 09/641,410		Applicant(s) KIELY	
				Examiner S. WEINSTEIN		Group Art Unit 1761	
Page 1 of 2							
U.S. PATENT DOCUMENTS							
*		DOCUMENT NO.	DATE	NAME	CLASS	SUBCLASS	
A		1769215	7/30	FRMIN	426	100	
B		1947010	2/34	JONES	426	95	
C		2167353	7/39	FREDIANI	426	95	
D		2217700	10/40	MUSNER	426	95	
E		6177110	1/2001	CHAN	426	134	
F		6054158	4/2000	HART ET AL	426	134	
G		4399153	8/83	TEWKA ET AL	426	134	
H		2632708	3/53	SUESKIND	426	134	
I		1718997	7/29	BURT	426	134	
J		1747112	2/30	GOOD	426	134	
K		1835719	12/31	PARR	426	134	
L		1618324	2/27	BURT	426	91	
M		1895697	1/33	YORK	426	91	
FOREIGN PATENT DOCUMENTS							
*		DOCUMENT NO.	DATE	COUNTRY	NAME	CLASS	SUBCLASS
N		649197	5/85	SWITZERLAND	COFITEC SA	426	101
S		3617093	10/86	GERMANY	GAUL M	426	134
P		198282	5/23	G. BRITAIN	ARMSTRONG	426	91
Q		647394	1/85	SWITZERLAND	AUJOURDUI	-	-
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* A copy of this reference is not being furnished with this Office action.
(See Manual of Patent Examining Procedure, Section 707.05(a).)

U.S. Patent and Trademark Office
PTO-892 (Rev. 9-96)

Part of Paper No. 11

U.S. GPO: 2001-479-216/45363

EXHIBIT B, pg. 36 09/64/410 GAU 1794 NFOA 5/23/03 KIELY 112

Notice of References Cited				Application No. 09/641410	Applicant(s) KIELY	
				Examiner S. WEINSTEIN	Group Art Unit 1761	Page 2 of 2
U.S. PATENT DOCUMENTS						
*		DOCUMENT NO.	DATE	NAME	CLASS	SUBCLASS
A		1939450	12/33	HORTON	426	91
B		2123215	7/38	THOMAS	426	91
C		2464515	3/49	KENNEDY	426	91
D		2570031	10/51	GIBSON	426	91
E		3274958	5/66	OTKENT	426	91
F		2469589	5/49	BARRICINI	426	134
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U.S. GPO: 2001-479-216/45363

EXHIBIT B, pg. 3c

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FINAL 3/9/04

KIELY 113

Notice of References Cited				Application No. 09/641,410		Applicant(s) KIELY	
				Examiner S. WEINSTEIN		Group Art Unit 1761	
Page 1 of 1							
U.S. PATENT DOCUMENTS							
*		DOCUMENT NO.	DATE	NAME	CLASS	SUBCLASS	
A		4350712	9/82	KOCHARIAN	—	—	
B		626161	7/01	BERMAN	—	—	
C		5435143	7/95	HEINRICH	—	—	
D		1913851	6/33	OPPERN	—	—	
E		4001400	1/77	NOYT	—	—	
F		5066502	11/91	EALLES	—	—	
G		2500006	3/50	OVERLAND	—	—	
H		1566329	12/25	LASKEY	—	—	
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(See Manual of Patent Examining Procedure, Section 707.05(a).)

Part of Paper No. _____

U.S. Patent and Trademark Office
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U.S. GPO: 2001-479-216/453e3

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GAU 1794

10/1/05

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Art Unit: 1761

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A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

13. Claims 179-182, 184-187, 189-198 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

14. Musher teaches ice cream on an edible support having at least two discernable edible members wherein one portion extends into the ice cream and one portion extends out of the ice cream for holding. Musher teaches stick, which may be completely edible (Page 5, Column 2, lines 46-56). The end of the stick may include a lollipop that is also connected structure pieces (Page 5, Column 1, lines 54-65), which may include items such as nuts or even a plurality of candy pieces (Page 3, Column 2, lines 14-21 and Page 5, Column 2, lines 24-35), and the lollipop and structure pieces may be coated in hard fat, which would prevent the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 5, Column 1, lines 65-Column 2, line 2). Musher further teaches the structure pieces around the lollipop, which include candy, can be placed concentrically (i.e. a circle around the lollipop) to improve support, or maneuvered in some other manner on the support (Page 5, Column 1, lines 45-54 and Column 2, lines 24-35). Furthermore, Musher teaches a plurality of voids in the overall structure (i.e. note the spaces in Figure 6 between the structure pieces and lollipop).

(Also See Page 6, Column 1, lines 4-70, Page 2, Column 2, line 64 to Page 3, Column 1, line 60 and Figures).

SUPPORT
NOT
MATERIAL
HAVING
TWO
MATERIAL

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Claim Rejections - 35 USC § 103

15. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

16. Claims 188 and 194 are rejected under 35 U.S.C. 103(a) as being unpatentable over Musher (US 2217700) as applied to claims 179-182, 184-187, 189-198 above, further in view of Berg (US 3459296).

17. Musher is silent in teaching a protective inedible mess guard on the edible support. Berg teaches an inedible mess guard to avoid a messy mass during consumption of frozen confections on support members and catching drippings, and this would provide a better grip since if the mess guard would not have drippings at the point where the consumer holds it (Column 1, lines 10-45, figures). Therefore, it would have been obvious to modify Musher and include an inedible mess guard since Berg teaches this will help to avoid a messy mass during the consumption of frozen confections on support members.

18. Claims 183 are rejected under 35 U.S.C. 103(a) as being unpatentable over Musher (US 2217700) as applied to claims 179-182, 184-187, 189-198 above, further in view of Hammond (US 2622784).

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Notice of References Cited	Application/Control No. 09/541,410	Applicant(s)/Patent Under Reexamination O'DONNELL-KIELY, ALICE M	
	Examiner Robert Madsen	Art Unit 1761	Page 1 of 1

U.S. PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Name	Classification
	A	US-3,459,296	08-1969	BERG JEAN LEROY	206/229
	B	US-2,622,784	12-1952	WEST HAMMOND	249/119
	C	US-			
	D	US-			
	E	US-			
	F	US-			
	G	US-			
	H	US-			
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	J	US-			
	K	US-			
	L	US-			
	M	US-			

FOREIGN PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Country	Name	Classification
	N					
	O					
	P					
	Q					
	R					
	S					
	T					

NON-PATENT DOCUMENTS

*		Include as applicable: Author, Title Date, Publisher, Edition or Volume, Pertinent Pages)
	U	
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	W	
	X	

*A copy of this reference is not being furnished with this Office action. (See MPEP § 707.05(a).)
Dates in MM-YYYY format are publication dates. Classifications may be US or foreign.

U.S. Patent and Trademark Office
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Notice of References Cited

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EXHIBIT

C, page 1

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Similarly terms "edible homogenous material" has also not been defined by applicant's disclosure. The original disclosure only uses the term "homogenous support" but does not disclose that the support comprises of "homogenous materials".

→ The term "composite material" as added to the claims introduces new matter as the term is not disclosed in the original disclosure and the introduction of the term "composite material" changes the description of "a candy bar" to "a composite material candy bar", which is not the same as a generic term "candy bar" as originally described. Other similar changes have been made throughout the claims, which are not supported by the original disclosure. Therefore, the amendments to the claims introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

Note: To expedite prosecution applicant is once again requested to furnish support for the newly added terms and phrase and subject matter recited in the new and amended claims in the current application. Furthermore, the applicant is requested to provide support where the claimed term or phrase is recited in the same context as it is being claimed.

Claim Rejections - 35 USC § 112 (Second paragraph)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 349-369 are rejected under 35 U.S.C. 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

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and water) or the term refers to two combined ingredient materials (such as cereal and chocolate). Clarification and/or correction is required.

The term "fun confection" or "fun composite material" in claims including 351 and 361 are relative terms which renders the claim indefinite. The term are not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. The terms "fun confection" might have different meanings for different people, e.g., bubble gum might be a fun confection for one person, and a disturbance or not fun confection for the other. Correction is required.

Claims including 362 are indefinite for the recitation of phrase "homogenous material" has also not been defined by applicant's disclosure. The original disclosure only uses the term "homogenous support" but does not disclose that the support comprises of homogenous ingredient materials". Thus the metes and bounds of the term are unclear and correction and /or clarification is required.

→ Claims 349-369 are indefinite for the recitation of "composite material". Applicant has not distinguished between the terms in the specification and thus the claim as recited is unclear as to what is the scope of the term composite material. It is unclear whether the claim requires materials that can form a composite or materials that are composites themselves or some other.

Claim 349-369, as recited is indefinite for the recitation of "edible composite material comprises two combined ingredient materials...each.. comprises " as it is unclear whether the edible composite material comprises two of the combined ingredients listed or if the two combined ingredients in the composite are composites themselves comprised of the listed ingredients. Clarification and/or correction is required.

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112, 1st
para 9

was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. In the instant case the term "composite material" as added to the claims introduces new matter as the term is not disclosed in the original disclosure and the introduction of the term "composite material" changes the description of "a candy bar" to "a composite material candy bar", which is not the same as a generic term "candy bar" as originally described. Other similar changes have been made throughout the claims, which are not supported by the original disclosure. Therefore, the amendments to the claims introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

Note: To expedite prosecution applicant is once again requested to furnish support for the newly added terms and phrase and subject matter recited in the new and amended claims in the current application. Furthermore, the applicant is requested to provide support where the claimed term or phrase is recited in the same context as it is being claimed.

Claim Rejections - 35 USC § 112 (Second paragraph)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 383-402 are rejected under 35 U.S.C. 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims are unclear for the recitation of "comprising a material comprising 'two ingredient materials', 'single component', 'constituent ingredient materials' as it is unclear as to what is encompassed by the terms 'ingredient' and 'material' and 'ingredient material'

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as it is used in claims. It is unclear as to how each of the terms "ingredient", "constituent ingredient material" and material are different from "ingredient materials" as recited in claims. Thus, the claims use terms ingredient and material and "ingredient material" interchangeably which makes the claims unclear as recited for the purposes of prior art comparison. Clarification and/or correction is required.

Claims are indefinite for the recitation of relative terms "mini", "mini size", "bite size ingredient" of claims (e.g., claims 384, 386) The terms, "mini", "mini size" or "bite size ingredient" have not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention and said terms may have different meaning for different people e.g., bite size might be different for a small child as compared to an adult. Correction is required.

Claims are indefinite for the recitation of "composite material". Applicant has not distinguished between the terms in the specification and thus the claim as recited is unclear as to what is the scope of the term composite material. It is unclear whether the claim requires materials that can form a composite or materials that are composites themselves or some other. The term "composite" recited is indefinite as it is unclear as to what the term composite refers to because even if a small part of edible support comprises a composite, then the entire support would be considered as a composite support and not just a part of the support would be designated as being a composite material or two ingredient material or two combined ingredient material. It is further unclear as to what relationship do terms like "a composite material", "two edible ingredient materials", "two combined ingredient materials" "composite ingredient comprising two combined edible ingredient materials" have to each other. Clarification and consistent use of the same terminology is requested. Correction is required to expedite the prosecution.

Further, a composite is defined as "made of separate elements", i.e. made of more than one element, i.e. comprising a minimum of two ingredient materials. Thus,

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

- { 1) Claims 349-369 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

The references and rejection are incorporated herein and as cited in the previous office actions.

→ { Musher teaches ice cream (frozen comestible) on an edible support structure or a composite support which has at least two edible discernable (i.e. perceptible) edible materials or components or members that are combined together to make the support, i.e., two combined ingredient materials (Page 1: Column 1, lines 37-46 and Column 2, lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), as instantly claimed.

The support as taught by Musher (figures 1-6) comprise of various edible ingredients, for example, cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47) that are combined to form the support, thus edible ingredient materials comprise an ingredient which forms a support, as claimed. Further since a plurality of ingredients are combined in the support as taught by Musher, the support comprises of composite ingredient materials and various combinations of ingredients that form the support, as recited in claims.

The support for a frozen confection as taught by Musher is made to be held in hand, (see figures 1-6), and may be made of stick, which can be either entirely edible or part inedible, which acts as a handle or support, as recited in claims.

The edible/inedible stick as taught by Musher is attached to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). The end of the stick may include a lollipop that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as

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FINAL OA 7/9/09
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applicant has chosen to redefine a known term. Where applicant acts as his or her own lexicographer to specifically define a term of a claim contrary to its ordinary meaning, the written description must clearly redefine the claim term and set forth the uncommon definition so as to put one reasonably skilled in the art on notice that the applicant intended to so redefine that claim term. *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1357, 52 USPQ2d 1029, 1033 (Fed. Cir. 1999).

Double Patenting

Nonstatutory Provisional Double Patenting

The nonstatutory double patenting rejection based on claims of Applications 10/163,209 and 10/167,812 has been withdrawn based on applicant's abandonment of said applications.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless —

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

- { 1) Claims 383-402 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

The references and rejection are incorporated herein and as cited in the previous office actions.

- { Regarding claims 383 and 394, Musher teaches ice cream (frozen comestible) on a non-frozen edible support structure or a composite support which has at least two edible discernable (i.e. perceptible) edible confectionary materials or components that are

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→ combined together to make the support, i.e., two constituent ingredient materials (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55), as instantly claimed. Also see (Page 4: column 1, line 72 to Column 2, line 23 and figures 1-6).

The support as taught by Musher (figures 1-6) comprise of various individual edible ingredients, for example, cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47) that are combined to form the support. Thus, the edible support as taught by Musher comprises of plurality of ingredient materials that make a single component edible confectionary support, as recited in claims **389** and **400**. The end of the stick may include a lollipop that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as nuts or even a plurality of candy pieces (page 3: Column 2, lines 14-21 and Page 5: Column 2, lines 24-35), which would constitute as bite size ingredients in a multi component edible support as recited in claims **386, 393, 397** and **402**. The lollipop as taught by Musher is a bite size ingredient, placed inside or embedded in the confection, as recited in **386, 393, 397** and **402**. Further since a plurality of ingredients are combined in the support as taught by Musher, the support comprises of composite ingredient materials and various combinations of ingredients that form the support, as recited in claims **384-387, 390, 392, 395-397, 399-401**.

The structure pieces i.e., before forming into a three dimensional composite support (Page 4: column 1, line 72 to Column 2, line 23) may be coated in hard fat (fluid ingredient), which prevents the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 3: Column 2 lines Page 5: Column 1, lines 65 to Column 2, line 2), i.e., moisture resistant barrier as recited in claims **384** and **395** or a coating as recited in claims **393** and **402**.

The support for a frozen confection as taught by Musher is made to be held in hand, (see figures 1-6), and may be made of stick, which can be either entirely edible or part inedible, which acts as a handle or support, as recited in claims **387-388, 393, 398-399** and **402**.

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Alice Kiely 914 245-6661

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Response to Advisory Action 17

would have no need of sending this information twice. All of applicant's claim terms are well known terms to those skilled in the art.

**Applicant's Claims Recite Novel Structure and So Distinguish
Over Musher and Feybusch Under 35 USC section 102**

N. B. Please refer to the Remarks of January 16, 2009 for the full argument regarding the above amendment.

N.B. Finality of the Next Action Is Precluded

Although the Summary of the past Office Actions indicates that claims 349 - 382 stand rejected, the Detailed Actions omit any explanation of how any cited art anticipates these claims. Applicant respectfully submits that this omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant. Consequently, a next Office Action rejecting claims 383 - 417 cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, presuming that such an Office action sets forth a prima facie case. (See MPEP ' 706.07(a)).

Constituent: 1. serving to compose or make up a thing; component; the constituent parts of a motor. (Dictionary.com)

All of the claims clearly recite novel features over Musher and Feybusch under Section 102.

Independent claim 383 first recites: "A non-frozen support for a frozen comestible..."

This limitation clearly distinguishes over Musher whose support does not show a non-frozen support. All of Musher's embodiments *as made and completed* in the drawings, specification, and claims all show a frozen support.

Claim 383 then recites: "... comprising an edible confectionary material comprising two ingredient materials within said edible confectionary material or two constituent ingredient materials."

This limitation clearly distinguishes over Musher as Musher does not show a non-frozen material comprising two ingredient materials, or two non-frozen constituent materials.

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Response to Advisory Action

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materials and cannot be made and completed with only two ingredient materials.

This limitation also clearly distinguishes over Feybusch whose materials each comprise only one ingredient material.

Independent claims 403 and 412 recite similar limitations. Claim 403 is a means claim and claim 412 is a method claim of making the support.

Therefore applicant submits that applicant's support is both novel and unobvious over Musher and Feybusch and submits that the independent claims and hence all claims should be allowed.

The dependent claims recite additional features of the invention to the independent claims and therefore applicant respectfully submits that they are a fortiori allowable.

In addition to the reason above, for at least the following reasons the finality of the next office action is precluded: Anticipation is based on FACT. Examiner has yet to identify to Applicant as to why Examiner holds to the rejection of Applicant's claims as to Musher's support being non-frozen, when all embodiments show a frozen support. Examiner has also yet to identify to Applicant *which one* of Musher's materials comprises two ingredient materials, and what the two ingredient materials specifically are. Examiner has thus not identified any of Musher's materials properly in any previous office action as required, MPEP § 707.07(f), and therefore cannot make the following office action final. Examiner is also not permitted to continue to downplay Applicant's remarks with moot or dismissive arguments, but must consider all of Applicant's correspondence and answer the substance of them. Applicant's comments are not made moot by way of amendments to the claims, and may not be thereby readily dismissed.

4. Section 707.07(f) of the Manual of Patent Examining Procedure (MPEP) instructs that: Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it. The Office

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Monday, March 16, 2009 7:26 PM

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Response to Advisory Action 20

→ repeated the rejections of all of the claims. The Office, however, neither "took note" of Applicants' argument nor "answered the substance" of Applicants' argument. Thus, the final Office Action is deficient because the Office failed to satisfy the requirements of MPEP § 707.07(f).

2131 Anticipation - Application of 35 U.S.C. 102(a), (b), and (e) [R-1]

TO ANTICIPATE A CLAIM, THE REFERENCE MUST TEACH EVERY ELEMENT OF THE CLAIM

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

The patent of Musher is at least silent as to a non-frozen support, a non-frozen material, two non-frozen ingredient materials, a composite material, and a non-frozen material comprising two constituent materials. Musher also does not show that his framework may be made up of only two ingredient materials. Feybusch does not show any material that comprises two ingredient materials within the material, since each of his materials comprise only one ingredient material. Neither Musher or Feybusch show a support for a frozen comestible that comprise an edible composite material. Applicant's support may be a cone for the subsequent placement of a frozen comestible, of a user's choice, and is patentably distinct. Musher does not show this. The liquid of Musher's ice cream would not congeal if not frozen and would pour out of the interstices onto the table. His invention is frozen. His support is frozen. Thus every element as set forth in the claim has NOT been found, see above. For at least the reasons stated above, the patents of Musher and Feybusch have not anticipated Applicant's claims. All elements of Applicant's invention are not anticipated. Therefore, the next office action cannot be legally be made final.

N. B. Please refer to the Remarks of January 16, 2009 for the full argument regarding the above amendment.

Conclusion

For all of the above reasons, Applicant submits that the claims define novel structure under §102, which novel structure is unobvious and thus patentable under §103. Accordingly Applicant

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Although the Summary of the past Office Actions indicates that claims 383 - 402 stand rejected, the Detailed Actions omit any explanation of how any cited art anticipates these claims. Applicant respectfully submits that this omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant. Consequently, a next Office Action rejecting claims 383 - 402 cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, presuming that such an Office action sets forth a prima facie case. (See MPEP ' 706.07(a)).

Specifically, in a previous Office Action, Applicant's claims 390, 394-402 "comprising a composite material" were said to be rejected by Examiner as being anticipated by Musher, without any evidence in support thereof.

In response, Applicant conveyed that the unit structure of Musher was comprised largely of voids to hold ice cream, and did not at least show a "solid material." (As per PTO's endorsed definition, below)

Examiner's "Ref. V 09/641,410," sent to Applicant, and endorsed by the PTO, from the Merriam-Webster's Collegiate Dictionary, Tenth Edition, page 236 defined: *Composite 4: a solid material which is composed of two or more substances having different physical characteristics and in which each substance retains its identity while contributing desirable properties to the whole.* [see attached]

Examiner had not addressed Applicant's response and omitted any explanation of how the cited reference to Musher anticipates Applicant's "composite material." This also amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant.

Examiner again has rejected, but not specified, how the method claims are patently different than claims 383-402, as required, as above. This also amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to the Applicant.

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Response to Office Action

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LANE

→ Additionally, the Examiner's citing of the new reference of Lane et al. (US 1690984) also precludes the next Office Action from being final.

Consequently, a next Office Action rejecting the claims cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, *presuming that such an Office action sets forth a prima facie case.* (See MPEP * 706.07(a)).

Musher States by His Own Hand That He Uses Separate Materials

2131 Anticipation - Application of 35 U.S.C. 102(a), (b), and (c) [R-1]

"A claim is anticipated only *if each and every element* as set forth in the claim is found, either expressly or inherently described, in a single prior art reference."

On 07/09/09 pg. 13(d), Examiner stated:

"Regarding the argument that Musher's support is not non-frozen" the applicant is reminded that the baked support and the flakes and nuts etc., as taught by Musher make the composite support structure, which comprises voids where the ice-cream mixture is poured and frozen. Applicant is further referred to page 4 of Musher, where Musher teaches molding of stick and other flake material into a support structure for the frozen confection and forming the structure and coating it. The formed and coated support structure of Musher is non-frozen prior to addition of liquid and freezing steps. Thus the composite support for a frozen confection as taught by Musher is not-frozen until the ice cream material is poured into the voids and the entire structure is frozen."

Applicant's Independent claim 383 first recites: "A support for a frozen comestible..."

This limitation clearly distinguishes over Musher who does not show a non-frozen support. *All* of Musher's *embodiments as made and completed* in the drawings, specification, and claims show a frozen support. "[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself..." MPEP 2113 Product-by-Process Claims. "...the end product, in both

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JAN-16-2009 07:05P FROM: DANIEL KIELY 9142456661

TO: 15712738300

P: 21/23

RESPONSE TO NON FINAL OFFICE ACTION

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

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present office action.

In response: The restriction requirement for which a response was made on January 18, 2003 was for the following:

Species I, wherein the comestible has a support as shown e.g. in Fig. 1, or

Species II, wherein the comestible has a plurality of supports as shown e.g. in Gif. 35-39

Further election is also required between

Species III, wherein the support is a composite support, as shown e.g. in Fig. 1, or

Species IV wherein the support is a homogenous support as shown e.g. in Fig. 3

Applicant elected Species III, "composite support." As may be seen above, there was no requirement for restriction of any method claim by an Examiner.

The requirement for restriction of 5/02/2002 also did not require any restriction regarding a method claim. In addition, all previous claims for the above application had been canceled. All present claims (after RCE) are directed to the same invention as elected in species III, as allowed.

37 CFR 1.142, entitles applicant to claim additional species that includes the limitations of a generic claim. As of now, Examiner has not related to applicant how the method claim as filed in the RCE is patentably distinct from the generic claim. As far as applicant is aware, method claims 345-348 includes all of the limitations of the generic claim.

There is no legal justification for the Election/Restriction objection and the premise that, "Thus claims 345-348 (370-382) will not be examined in the present office action." Withdrawing Applicant's claims from consideration is delay of prosecution and prejudicial. Applicant respectfully requests removal of the objection and examination/reinstatement of all pending claims 349-383 for the above claims, as written.

Claim Rejections - 35 USC section 112 (first paragraph)

The examiner states that claims 368 and 369 are rejected under 35 USC 112, first paragraph as failing to comply with the enablement requirement. In the instant case claim 368 as recited is non enabled as there is no disclosure either in the claim or in the specification about what means or

EXHIBIT F page 2a

RESTRICTION 5/2/02

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640 794KIELY
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NOT RELIED UPON

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This application contains a myriad number of species or inventions (depending on how one looks at them) and the follow restriction/election is made.

This application contains claims directed to the following patentably distinct species of the

claimed invention: Species I, wherein the comestible is frozen

Species II, wherein the comestible is non-frozen

In addition, beside electing Species I and II, the following election of support is required :

Species III wherein the support is malleable

Species IV wherein the support is non-malleable

Depending on which species ^{is} of support ^{is} elected, If the non-malleable species is elected, a further election is required between:

Species IVa, wherein the support is a candy bar

Species IVb, wherein the support is a cookie bar

Species IVc, wherein the support is a granola bar

It is noted that two species/inventions of support ingredients are recited (i.e. claims 25&26). Presumably, they are mutually exclusive and are associated with either Species III or IV.

Thus, wherein the support is:

Species x, dextrose, malt dextrine, etc.

Species y, marshmallow

Species z, licorice

In addition, and, again presumably as a function of the type of confection (i.e. non-frozen or frozen), applicant is required to elect one of the following:

EXHIBIT F page 2b

RESTRICTION 5/2/02
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Page 3

Species a, wherein the supported comestible rocks

Species b, wherein the supported comestible rolls

Species c, wherein the supported comestible spins

Species d, wherein the supported comestible twists

Species e, wherein the supported comestible whistles

Species f, wherein the supported comestible hangs

Species g, wherein the supported comestible pierces

Species h, wherein the supported comestible stands upright

Species i, wherein the supported comestible invertible

Species j, wherein in the supported comestible is wearable

As noted above, although these are referred to as "species" of supported comestible, they could also be considered separate inventions. However, the affect is the same in terms of a restriction requirement.

The claims also recite various species of additional "fun" ingredients and election is required between:

Species aa, wherein the ingredient is flavor

Species bb, wherein the ingredient is a decoration

Species cc, wherein the ingredient is prize

Currently, no claim is generic.

The claims are also restrictable between Invention I, the supported comestible as claimed in claims 1-16.

Invention II, the kit as claimed in claim 17.

EXHIBIT F page 2c

RESTRICTION

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NOT RELIED UPON

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Invention III, the mold and packaging apparatus

These inventions are separate and distinct. The supported comestible can be made without the specific kit Group II and it does not have to be made and combined with the elements of Group III. The inventions of Group II and III are two distinct, unrelated inventions. Also, the kit of Group II would not be associated with the product of Group I. It could be used to make the product of Group I.

To expedite prosecution, it is noted that the application was filed without a claim 29. Therefore, claim 30 is renumbered claim 29.

Also, the specification and drawings are replete with inconsistencies in numbering and lettering.

For example, the ingredients are not arranged concentrically in Fig. 33 as is stated on page 33 of the specification and in figure 2 the support is shown as "62" rather than "62a" as is noted on page 33. There are many more errors of this type. Applicant should carefully review all 98 pages of the specification, as well as the nineteen sheets of drawings, for similar problems.

The remainder of the references cited on the USPTO form are cited as art of interest.

Any inquiry concerning this communication or from the examiner should be directed to Steven Weinstein whose telephone number is 703-308-0650. The examiner can generally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

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For the record, applicant has not specifically addressed the election of species set forth in the Office action mailed 5/2/02, paper no. 7. Ordinarily, applicant is required to elect one or more species. There is no statement that an election was not made since the amendment presents a group of claims to which the election is no longer relevant. However, this does seem to be the case.

In view of the presentation of the new set of claims in the amendment filed 6/5/02, paper no. 8, the election in paper no. 7 is withdrawn in favor of the following new election:

This application contains claims directed to the following patentably distinct species of the claimed invention:

Species I, wherein the comestible has a support as shown e.g. in Fig. 1, or

Species II, wherein the comestible has a plurality of supports as shown e.g. in Fig. 35-39,

and

Further, election is also required between

Species III, wherein the support is a composite support, as shown e.g. in Fig. 1, or

Species IV, wherein the support is a homogeneous support as shown e.g. in Fig. 3

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, no claim is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

EXHIBIT F ⁴ 1/23/03 09/64,410 GAU 1794 KIELY 134
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By the above amendment, Applicant has addressed and elected the single disclosed Species III, ^{Not PRODUCT VS. METHOD} above, as required under 35 U.S.C. 121, of "a composite support," and a listing of all new claims (72-98) readable thereon, also above.

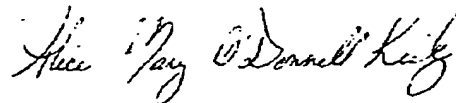
Applicant has amended the claims of the above application to elect a single patentable species.

No new matter has been entered by way of amending the claims.

Conclusion:

For the above reasons, applicant submits that the claims are now in proper form, and that the claims all define a patentable invention. Therefore she submits that this application is now in condition for allowance, which action she respectfully solicits.

Very Respectfully,



Alice Mary O'Donnell Kiely

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FILING DATE
8/18/2000

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utilitarian support for said body, said malleable support being suited for a plurality of configurations and orientations.

- (28) A method of providing a supported comestible comprising:
- (a) providing a body of an edible substance,
 - (b) providing an edible support, having first and second portions, for supporting said body,
 - (c) inserting said first portion of said edible support, into said body, supporting said body, and
 - (d) providing a second portion, having sufficient size outside of said body to provide a utilitarian support for said body.
- (30) The method of providing a supported comestible of claim 28, further including an edible, moisture-proof, coating on said edible support and said body.

EXHIBIT

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KIELY

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Office Action Summary

Application No.

09/641,410

Applicant(s)

O'DONNELL-KIELY, ALICE MARY

Examiner

JYOTI CHAWLA

Art Unit

1794

- The MAILING DATE of this communication appears on the cover sheet with the correspondence address -

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 16 March 2009.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 383-416 is/are pending in the application.
- 4a) Of the above claim(s) 403-416 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 383-402 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

EXHIBIT E page 2

09/641,410 GAU 1794

AUG 30 2011 KIELY

137

Notice of References Cited	Application/Control No. 09/641,410	Applicant(s)/Patent Under Reexamination O'DONNELL-KIELY, ALICE M	
	Examiner JYOTI CHAWLA	Art Unit 1794	Page 1 of 1

U.S. PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Name	Classification
→ *	A	US-1,690,984	11-1928	LANE FRED W et al.	426/94
	B	US-			
	C	US-			
	D	US-			
	E	US-			
	F	US-			
	G	US-			
	H	US-			
	I	US-			
	J	US-			
	K	US-			
	L	US-			
	M	US-			

FOREIGN PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Country	Name	Classification
	N					
	O					
	P					
	Q					
	R					
	S					
	T					

NON-PATENT DOCUMENTS

*		Include as applicable: Author, Title, Date, Publisher, Edition or Volume, Pertinent Pages)
	U	
	V	
	W	
	X	

*A copy of this reference is not being furnished with this Office action. (See MPEP § 707.05(a).)
 Dates in MM-YYYY format are publication dates. Classifications may be US or foreign.

U.S. Patent and Trademark Office
 PTO-892 (Rev. 01-2001)

Notice of References Cited

Part of Paper No. 20090622

EXHIBIT B page 3

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KIELY

138

Monday, March 16, 2009 7:26 PM

Alice Kiely 914 245-6661

p.07

Appn. Number 09/641,410 (Kiely) GAU 1794 Response to Advisory Action 6

389. (New): The support for a frozen comestible of claim 383 wherein said support comprises a single component.

390. (New): The support for a frozen comestible of claim 383 wherein said edible confectionary material comprises an edible composite material, said edible composite material comprises two ingredient materials within said edible composite material or two constituent ingredient materials.

391. (New): The support for a frozen comestible of claim 383 wherein one of said two constituent materials comprises an edible hollow confection length, wherein the other of said two constituent materials comprises an edible filling placed in said hollow length, wherein said filling comprises a plurality of candy beads, colored sugar, flavored sugar, an edible confection rope, or a fluid ingredient, said two ingredient materials comprise two ingredient materials placed concentrically.

392. (New): The support for a frozen comestible of claim 385, further comprising an ingredient in said edible confectionary material comprising a candy, mini colored chips, flavored chips, mini size pieces of candy, crushed candy, mini size pieces of individually coated candy, nuts, candy beads, a fluid ingredient, chewing gum, an edible coating, an edible moisture barrier, shortening, oil, a cookie, a cracker, a wafer, a bread stick, a potato stick, a pretzel, fudge, peanut butter, cheese, whole grain comprising crisped rice, granola, crushed comestibles, crumbs, cereal, nougat, yogurt, mint, ginger, graham, a filling, flavored sugar, colored sugar, gelatin, coconut, fruit, a binder, an edible material comprising two ingredient materials, an edible composite material, a soft gummy appendage, or combinations thereof.

393. (New): The support for a frozen comestible of claim 383, further comprising a supported frozen comestible, a plurality of supported frozen comestibles, a frozen support, a frozen supported comestible, a frozen plurality of supported

EXHIBIT B page 4

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KIELY

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JUL-30-2008 09:23P FROM: DANIEL KIELY 9142456661

TO: 15712738300

P: 7/19

Appn. Number 09/641,410 (Kichy)

GAU 1794

Request for RCE

6

Claims: 1 - 348 (canceled)

I claim:

349. (New): A support for a frozen comestible comprising a material comprising two edible ingredient materials.

350. (New): The support for a frozen comestible of claim 349 wherein one of said two ingredient materials comprises an edible hollow confection length, wherein the other of said two ingredient materials comprises an edible filling placed in said hollow length, wherein said filling comprises a plurality of candy beads, colored sugar, flavored sugar, an edible confection rope, or a fluid ingredient, said two ingredient materials comprise two ingredient materials placed concentrically.

351. (New): The support for a frozen comestible of claim 349 wherein said material comprising two ingredient materials comprises a bite size fun confection placed inside or embedded in said support, said bite size fun confection comprises two ingredient materials, wherein each of said two ingredient materials comprise chocolate, fudge, chocolate chips, rainbow chips, a candy, a toy shaped candy, or chewing gum, said bite size fun confection comprises an ingredient in said support.

352. (New): The support for a frozen comestible of claim 349 wherein said material comprising two edible ingredient materials comprises an edible composite material.

353. (New): The support for a frozen comestible of claim 349 wherein said material comprising two edible ingredient materials comprises said support.

354. (New): The support for a frozen comestible of claim 349 wherein said material comprising two edible ingredient materials comprises an edible multi-ingredient

PAGE 7/19 * RCVD AT 7/30/2008 9:16:21 PM [Eastern Daylight Time] * SVR:USPTO-EFAX-6/40 * DNS:2738300 * CSID:9142456661 * DURATION (mm:ss):05:24

EXHIBIT

H.

Pg. 1

09/641,410

CAU 1794

KIELY

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JAN-16-2009 07:04P FROM: DANIEL KIELY 9142456661

TD: 15712738300

P: 16/23

Appn. Number 09/641,410 (Kiely)

CAU 1794

Amendment A

15

Remarks - General

Applicant submits that all claims clearly define novel and unobvious subject matter over each and every reference and any combination thereof.

Amendments to Specification

Examiner stated that the amendment filed July 30, 2008 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: the addition of "composite material" in paragraphs [0043] [0044] and [0166], which was not disclosed in the specification as originally filed and has also been added to claims. The term "a composite material" as disclosed in the amendment would introduce new matter and change the description from "a candy bar" to "a composite material candy bar" in paragraph [0164] which is not the same as a generic term "candy bar" as originally described. Therefore, the amendments to the specification introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

- ★ See 608.01(1) **Original Claims** In establishing a disclosure, applicant may rely not only on the description and drawing as filed but also on the original claims if their content justifies it.

Where subject matter not shown in the drawing or described in the description is claimed in the application as filed, and such original claim itself constitutes a clear disclosure of this subject matter, then the claim should be treated on its merits, and requirement made to amend the drawing and description to show this subject matter. The claim should not be attacked either by objection or rejection because this subject matter is lacking in the drawing and description. It is the drawing and description that are defective, not the claim.

In response, as said in previous responses to office actions, correcting the specification to reflect what is in the original claims, as filed, is NOT introduction of new matter.

Applicant's original disclosure August 18, 2000, illustrated and recited, "a composite material."

The mere mention that "composite material" changes the description from a "candy bar" to a

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JAN-16-2009 07:04P FROM: DANIEL KIELY 9142456661

TO: 15712738300

P: 17/23

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

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↓ "composite material candy bar" is not sufficient for a prima facie case of rejection under 35 USC 132(a), and is moot. Applicant's original claims 6, 19-23 recite: "wherein said support comprises a composite material." Drawings, the terms "composite support 62, 62A... Milky Way Bar, Snickers Bar, etc.," "composite candy bar" throughout the specification, and PTO date stamped disclosure documents 1994, 1996, 1999 showing and testing of composite material candy bars, is direct and factual evidence of a support comprising "a composite material." Examiner has failed to satisfy its burden to articulate a prima facie case. Without adequate evidence of the basis of this rejection, the burden to rebut this rejection with evidence and/or argument has not yet shifted to → Applicant. Applicant has evidence in the original claims and in the specification. Examiner does not show sufficient evidence to the contrary.

N.B. Reading the specification shows a "composite material candy bar:"

[0195] A list of some suitable supports, are as follows:

[0196] composite candy bar with caramel, whipped chocolate nougat which is dipped in chocolate

[0197] composite candy bar with an elongated cookie stick, with caramel on top of the caramel, which is then dipped in chocolate

[0199] composite candy bar with chocolate, nuts and nougat inside

See MPEP section 2164. "Furthermore, when the subject matter is not in the specification portion of the application as filed but is in the claims, the limitation in and of itself may enable one skilled in the art to make and use the claim containing the limitation. When claimed subject matter is only presented in the claims and not in the specification portion of the application, the specification should be objected to for lacking the requisite support for the claimed subject matter using Form Paragraph 7.44. See MPEP § 2163.06. This is an objection to the specification only and enablement issues should be treated separately." 2163.06: "The claims as filed in the original specification are part of the disclosure and therefore, if an application as originally filed contains a claim disclosing material not disclosed in the remainder of the specification, the applicant may amend the specification to include the claimed subject matter."

↑ Examiner thus admits that the terms "composite support 62," and "composite support 62A..." is interchangeable, or one in the same, for the term "composite material support 62, 62A...", or otherwise would have asked for a correction of the specification in the first office action in view of original claims 6, 19-23, and all the recitations of composite support 62 and "composite candy

PAGE 17/23 * RCVD AT 1/16/2009 6:59:30 PM [Eastern Standard Time] * SVR:USPTO-EFAXF-6/30 * DNIS:2738300 * CSID:9142456661 * DURATION (mm:ss):07-08

* see pg. H1 608.01(i)

Exhibit H pg. 3

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GAU 1794

KIELY
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JAN-16-2009 07:05P FROM: DANIEL KIELY 9142455661

TO: 15712738300

P: 18/23

RESPONSE TO 1ST OFFICE ACTION AFTER RCE

Appn. Number (09/641,410) (Kiely)

GAU 1794

Amendment A

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↓ bar comprising the ingredients of caramel, whipped nougat," etc. See: [0195, 0196, 0199] above, i.e. material not components, and replete with descriptions of composite support Snickers Bar, Milky Way Bar, Baby Ruth Bar throughout the specification, as above. These candy bars are known to one skilled in the art, and notably to an examiner in the required field, to comprise a "composite material." MPEP section 2164 recites: "When claimed subject matter is only presented in the claims and not in the specification portion of the application, the specification should be objected to for lacking the requisite support for the claimed subject matter using Form Paragraph 7.44." Examiner had NOT objected to the specification, and thus concurred. (see also 2111 Claim Interpretation i.e. *consistent with* the specification) The evidence is overwhelming that Examiner(s) were well aware that applicant was claiming a composite material. Examiners did not object to name brand composite candy bars found in a grocery store in the specification. Examiner did not object to the specification in view of all claims that recited "a composite support" in the independent claims and only added components in the dependent claims, such as "a composite support... *further including a mess guard, a drip guard, a lollipop.*" Having all claims written as such, examiner had failed to fulfill its burden to identify the support of the application, and having made no requirement for applicant to change the wording of the specification "composite support 62, 62A..." thus understood the meaning of composite support to mean composite material support, such as Milky Way, Snickers, etc. Examiner is required to have come to understand the claims before the first office action.

↑ MPEP Examination

The term "bar" is a single component. As known to one skilled in the art, a "composite candy bar" is a composite material. As above, Examiner's argument claiming "new matter" is moot. Without adequate evidence of the basis of this rejection, the burden to rebut this rejection with evidence and/or argument has not yet shifted to Applicant. Examiner does not have sufficient evidence to the contrary.

Applicant therefore respectfully requests reconsideration and allowance of the amendments to the specification.

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applicant has chosen to redefine a known term. Where applicant acts as his or her own lexicographer to specifically define a term of a claim contrary to its ordinary meaning, the written description must clearly redefine the claim term and set forth the uncommon definition so as to put one reasonably skilled in the art on notice that the applicant intended to so redefine that claim term. *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1357, 52 USPQ2d 1029, 1033 (Fed. Cir. 1999).

Double Patenting

Nonstatutory Provisional Double Patenting

The nonstatutory double patenting rejection based on claims of Applications 10/163,209 and 10/167,812 has been withdrawn based on applicant's abandonment of said applications.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

- 1) Claims **383-402** are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

The references and rejection are incorporated herein and as cited in the previous office actions.

→ Regarding claims **383** and **394**, Musher teaches ice cream (frozen comestible) on a non-frozen edible support structure or a composite support which has at least two edible discernable (i.e. perceptible) edible confectionary materials or components that are

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KIELY

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Page 7

combined together to make the support, i.e., two constituent ingredient materials (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55), as instantly claimed. Also see (Page 4: column 1, line 72 to Column 2, line 23 and figures 1-6).

The support as taught by Musher (figures 1-6) comprise of various individual edible ingredients, for example, cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47) that are combined to form the support. Thus, the edible support as taught by Musher comprises of plurality of ingredient materials that make a single component edible confectionary support, as recited in claims **389** and **400**. The end of the stick may include a lollipop that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as nuts or even a plurality of candy pieces (page 3: Column 2, lines 14-21 and Page 5: Column 2, lines 24-35), which would constitute as bite size ingredients in a multi component edible support as recited in claims **386**, **393**, **397** and **402**. The lollipop as taught by Musher is a bite size ingredient, placed inside or embedded in the confection, as recited in **386**, **393**, **397** and **402**. Further since a plurality of ingredients are combined in the support as taught by Musher, the support comprises of composite ingredient materials and various combinations of ingredients that form the support, as recited in claims **384-387**, **390**, **392**, **395-397**, **399-401**.

The structure pieces i.e., before forming into a three dimensional composite support (Page 4: column 1, line 72 to Column 2, line 23) may be coated in hard fat (fluid ingredient), which prevents the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 3: Column 2 lines Page 5: Column 1, lines 65 to Column 2, line 2), i.e., moisture resistant barrier as recited in claims **384** and **395** or a coating as recited in claims **393** and **402**.

The support for a frozen confection as taught by Musher is made to be held in hand, (see figures 1-6), and may be made of stick, which can be either entirely edible or part inedible, which acts as a handle or support, as recited in claims **387-388**, **393**, **398-399** and **402**.

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1) Claims 349-369 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

Section 102

Rejection
based
upon
"composite
support"

The references and rejection are incorporated herein and as cited in the previous office actions.

Musher teaches ice cream (frozen comestible) on an edible support structure or a composite support which has at least two edible discernable (i.e. perceptible) edible materials or components or members that are combined together to make the support, i.e., two combined ingredient materials (Page 1: Column 1, lines 37-46 and Column 2, lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), as instantly claimed.

The support as taught by Musher (figures 1-6) comprise of various edible ingredients, for example, cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47) that are combined to form the support, thus edible ingredient materials comprise an ingredient which forms a support, as claimed. Further since a plurality of ingredients are combined in the support as taught by Musher, the support comprises of composite ingredient materials and various combinations of ingredients that form the support, as recited in claims.

The support for a frozen confection as taught by Musher is made to be held in hand, (see figures 1-6), and may be made of stick, which can be either entirely edible or part inedible, which acts as a handle or support, as recited in claims.

The edible/inedible stick as taught by Musher is attached to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). The end of the stick may include a lollipop that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as

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Similarly terms "edible homogenous material" has also not been defined by applicant's disclosure. The original disclosure only uses the term "homogenous support" but does not disclose that the support comprises of "homogenous materials".

Section 112
1st P

The term "composite material" as added to the claims introduces new matter as the term is not disclosed in the original disclosure and the introduction of the term "composite material" in "composite material" changes the description of "a candy bar" to "a composite material candy bar", which is not the same as a generic term "candy bar" as originally described. Other similar changes have been made throughout the claims, which are not supported by the original disclosure. Therefore, the amendments to the claims introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

Composite
materialSection
112

but

"Composite
Support"

in

Section
102

Note: To expedite prosecution applicant is once again requested to furnish support for the newly added terms and phrase and subject matter recited in the new and amended claims in the current application. Furthermore, the applicant is requested to provide support where the claimed term or phrase is recited in the same context as it is being claimed.

Claim Rejections - 35 USC § 112 (Second paragraph)

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 349-369 are rejected under 35 U.S.C. 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

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and water) or the term refers to two combined ingredient materials (such as cereal and chocolate). Clarification and/or correction is required.

The term "fun confection" or "fun composite material" in claims including 351 and 361 are relative terms which renders the claim indefinite. The term are not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. The terms "fun confection" might have different meanings for different people, e.g., bubble gum might be a fun confection for one person, and a disturbance or not fun confection for the other. Correction is required.

Claims including 362 are indefinite for the recitation of phrase "homogenous material" has also not been defined by applicant's disclosure. The original disclosure only uses the term "homogenous support" but does not disclose that the support comprises of homogenous ingredient materials". Thus the metes and bounds of the term are unclear and correction and /or clarification is required.

Section
112 2nd P

"Composite
Material"

in Section 112

but

"Composite
Support"

Section
102!

Claims 349-369 are indefinite for the recitation of "composite material". Applicant has not distinguished between the terms in the specification and thus the claim as recited is unclear as to what is the scope of the term composite material. It is unclear whether the claim requires materials that can form a composite or materials that are composites themselves or some other.

Claim 349-369, as recited is indefinite for the recitation of "edible composite material comprises two combined ingredient materials...each.. comprises " as it is unclear whether the edible composite material comprises two of the combined ingredients listed or if the two combined ingredients in the composite are composites themselves comprised of the listed ingredients. Clarification and/or correction is required.

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CAU 1794

4/30/08 FINAL REJECTION

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claim one invention at a time and support and means for making the support are considered as two separate inventions.

Note: Regarding the means for making a support as recited in claims 343 applicant is referred to the rejection under 35 USC 112 above.

Regarding claim 343, the edible support or cone taught by Feybusch comprises of two ingredient materials, i.e., cone making pastry material (such as sugar, flour etc) and edible adhesive material, such as, molasses (Page 1, lines 55-63), and popcorn or nuts or brittle or puffed rice (Page 1, lines 20-30) as recited in claim 343.

Regarding claim 344, Feybusch teaches of support for a frozen comestible, such as, ice cream. The details of Figure 3 show a picture of ice cream on top of the cone. Feybusch also teaches that the ice confection is highly palatable in the edible support containing with molasses with popcorn or peanuts or rice (Page 1, lines 85-95).

Thus the invention as recited in claims 319-344 is anticipated by Feybusch.

2) Claims 319-344 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

The references and rejection are incorporated herein and as cited in the previous office actions.

Musher teaches ice cream (frozen comestible) on an edible support structure or a composite support which has at least two edible discernable (i.e. perceptible) edible materials or components or members that are combined together to make the support, i.e., two combined ingredient materials (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), as recited in claims 319, 332, 338 and 343.

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The references and rejection are incorporated herein and as cited in the previous office actions.

Musher teaches ice cream (frozen comestible) on an edible support structure made of stick, which can be either edible or inedible, as instantly claimed. The edible stick as taught by Musher is attached to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). Thus Musher teaches of a frozen comestible, and a composite material with one or more ingredients, for supporting the frozen comestible. The end of the stick may include a lollipop that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as nuts or even a plurality of candy pieces (page 3: Column 2, lines 14-21 and Page 5: Column 2, lines 24-35), and the lollipop and structure pieces i.e., before forming into a three dimensional composite support (Page 4: column 1, line 72 to Column 2, line 23) may be coated in hard fat (fluid ingredient), which prevents the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 3: Column 2 lines Page 5: Column 1, lines 65 to Column 2, line 2). Musher also teaches that the finished product or the composite formed support can be coated with chocolate or sprinkled with other flavoring material, i.e., enrobed or dipped ingredient which is fluid (Page 3: Column 2, lines 25-30) to make the edible support moisture proof as instantly claimed.

The composite support as taught by Musher has at least two discernable (i.e. perceptible) edible materials or components or members (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), wherein one portion extends into the ice cream and the other portion extends out of the ice cream for holding the frozen confection vertically (i.e., Musher teaches of a vertically orientated utilitarian support) (See figures 1-6) as instantly claimed. Furthermore, Musher teaches a plurality of voids in the overall structure (i.e. note the spaces in Figure 6 between the structure pieces and lollipop (Page 2: Column 2, lines 20-25; Page 3:

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09/641,410/5/8/07 FINAL REJECTION
GAV 1794KIELY
ISO

Application/Control Number: 09/641,410

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Art Unit: 1761

The references and rejection are incorporated herein and as cited in the previous office actions mailed on or before June 1, 2006.

Musher teaches ice cream (frozen comestible) on an edible support structure made of stick, which can be inedible, however, the stick can be made completely edible. The edible stick as taught by Musher is attached to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). Thus Musher teaches of a frozen comestible, and a composite ingredient, for supporting the frozen comestible as recited in claims 229, 232- 233, 246, 249-250, 253-257. The end of the stick may include a lollipop (as recited in claim 239) that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as nuts or even a plurality of candy pieces (page 3: Column 2, lines 14-21 and Page 5: Column 2, lines 24-35), and the lollipop and structure pieces i.e., before forming into a three dimensional composite support (Page 4: column 1, line 72 to Column 2, line 23) may be coated in hard fat (Enrobed or dipped ingredient), which prevents the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 3: Column 2, lines Page 5: Column 1, lines 65 to Column 2, line 2), as recited in claims 234 and 244. Musher also teaches that the finished product or the composite formed support can be coated with chocolate or sprinkled with other flavoring material, i.e., enrobed or dipped ingredient (Page 3: Column 2, lines 25-30), as recited in claims 235 to 237.

The composite support as taught by Musher has at least two discernable (i.e. perceptible) edible members (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), wherein one portion extends into the ice cream and the other portion extends out of the ice cream for holding the frozen confection vertically (i.e., Musher teaches of a vertically orientated utilitarian support) (See figures 1-6), as recited in claims 230, 231, 241-242, 251-252, 254.

The composite support as taught by Musher has plurality of individual ingredients, which can be discernible (i.e. perceptible), such as the cereal flakes, candy flakes, ribbons,

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6/1/06 Non Final

KIELY
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Art Unit: 1761

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DETAILED ACTION

The response filed December 6, 2005 has been entered. Claims 179-198 remain pending. Claims 181, 184-189, 192, 194-196 and 198 have been amended.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 102

Claims 179-182, 184-198 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

Musher teaches ice cream (frozen comestible) on an edible support having at least two discernable (i.e. perceptible) edible members (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), wherein one portion extends into the ice cream and one portion extends out of the ice cream for holding. Musher teaches stick, which may be completely edible (Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). The end of the stick may include a lollipop that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as nuts or even a plurality of candy pieces (page 3: Column 2, lines 14-21 and Page 5: Column 2, lines 24-35), and the lollipop and structure pieces i.e., before forming into a composite support (Page 4: column 1, line 72 to Column 2, line 23) may be coated in hard fat, which would prevent the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 3: Column 2

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EXHIBIT I, pg. 8 09/641,410
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Art Unit: 1761

Page 6

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

13. Claims 179-182, 184-187, 189-198 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

14. Musher teaches ice cream on an edible support having at least two discernable edible members wherein one portion extends into the ice cream and one portion extends out of the ice cream for holding. Musher teaches stick, which may be completely edible (Page 5, Column 2, lines 46-56). The end of the stick may include a lollipop that is also connected structure pieces (Page 5, Column 1, lines 54-65), which may include items such as nuts or even a plurality of candy pieces (Page 3, Column 2, lines 14-21 and Page 5, Column 2, lines 24-35), and the lollipop and structure pieces may be coated in hard fat, which would prevent the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 5, Column 1, lines 65-Column 2, line 2). Musher further teaches the structure pieces around the lollipop, which include candy, can be placed concentrically (i.e. a circle around the lollipop) to improve support, or maneuvered in some other manner on the support (Page 5, Column 1, lines 45-54 and Column 2, lines 24-35). Furthermore, Musher teaches a plurality of voids in the overall structure (i.e. note the spaces in Figure 6 between the structure pieces and lollipop).

(Also See Page 6, Column 1, lines 4-70, Page 2, Column 2, line 64 to Page 3, Column 1, line 60 and Figures).

EXHIBIT J, pg. 1

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DETAILED ACTION

Applicant's submission filed on 6/24/2010 has been entered. Claims 53-78 have been added to the current application. Claims 54, 59-62, 65-71, 73-74, and 76-78 have been amended by the applicant. Claims 53-78 are pending and examined in the current application.

Amendments to Specification

The amendments to specification filed by the applicant on 6/24/2010 have been received which add proposed term "material" in paragraphs [0044], [0045], [0165], and correct a typographical error and replacing "caramel on top of the caramel" with "caramel on top of the cookie caramel" in paragraph [0197]. The "composite material" was part of claim 6 of parent application 09/641410 submitted on 8/18/2000 and thus regarded as part of original disclosure of the parent application. Therefore, the amendments do not introduce any new matter and have been entered.

Claim Objections

Claims 53-78 are once again objected to because of the following informalities: base claims 53, 63, and 72, line 1, have a typographical error as the claim recites the term "comprising" twice. Appropriate correction is required.

Claims 60, 69, and 76 is also objected for the recitation of "comprising" twice in line 2 of each of the claims. Appropriate correction is required.

EXHIBIT K, pg. 1

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Art Unit: 1761

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 76-81, 89, 90, 94 and 96 are rejected under 35 USC 112, first paragraph for being based on a non-enabling disclosure.

(INDEPENDENT CLAIMS
72, 87, 91, 95 NOT REJECTED)

In regard to claim 76, claim 76 can be construed to recite that the edible support comprises one or more elements a through m, and particulate matter and a homogenous comestible. The claim is based on a non-enabling disclosure, since it is not seen that the specification supports one or more of elements a through m as well as having particulate matter and be homogenous. In fact, since the edible support is disclosed as being a composite, how can it be homogenous? The two are mutually inconsistent. Clarification and/or correction of the claim language is requested. That is, if the particulate matter and homogenous comestible are additional to the support, the claims, should reflect this. For purposes of examination, since applicant has not defined composite edible support, this phrase will be construed to mean any two materials in contact with each other. Claim 77 recites that the additional confection provides a "lollipop configuration". Neither claim nor the specification is clear as to what this means. Claim 79 recites that the supported comestible includes means for inhibiting the breakage of the edible support. As disclosed, it is not clear what is this "means for inhibiting breakage". Similarly in claim 80 for the phrase means for providing a supported comestible "designed for a child". How would this supported comestible differ from any other? What makes the comestible "designed for a child"? Claim 81 shares a

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Art Unit: 1761

similar problem as that of claim 76. That is, if one construes claim 81 as the barrier having all the properties of elements a-e as well as additional properties of the second a and b, where is this supported in the specification? If these are alternative expressions of characteristics, the claim should be amended to make this concept clearer.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 72-76, 87, 88, 91, 95 and 98 are rejected under 35 U.S.C. 102(b) as being anticipated by Ref. N (Swiss 649197). NOT MUSHY

Ref. N discloses a supported comestible comprising a comestible comprising a body of an edible substance and a substantially composite edible support capable of supporting the comestible wherein the edible support replaces the conventional wood ("bois") or plastic ("plastique") sticks used to support frozen confections. Thus, since the composite edible support replaces the conventional ice cream sticks, it would inherently have a first portion in the comestible and a second portion outside the comestible for hand held support. Thus, contrary to what has been urged, Ref. N not only teaches edible support sticks are conventional, but also teaches composite edible sticks are conventional as well. In regard to claim 74, Ref. N discloses that the support has good mechanical resistance and is thus inherently "substantially" non-malleable. In regard to claim 76, as noted above, the wording and thus the intent of claim 76 is unclear. If one construes all of the elements in the alternative, then Ref. N discloses

EXHIBIT K, pg. 3

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sugar as an ingredient of the edible support. In regard to the method claim 95, since Ref. N discloses the composite edible sticks replace the conventional wooden sticks. Ref. N inherently teaches adding the stick to the comestible before freezing which is how the wooden sticks are added to the confection since after freezing, the addition of the stick would be difficult or impossible.

→ The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

→ Claims 76-79, 86, 93 and 97 rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Musher (2,217,700).

If one construes claim 76 to recite one of the elements a through m and a particulate and a homogenous comestible, then Musher can be relied on to teach the conventionality of edible supports (36), additional edible homogenous material (35) and particulate material (10). Once it is known to provide edible and even edible composite supports, the particular conventional additional materials one chooses to add is seen to have been an obvious matter of choice and one of personal taste and to modify, Ref. N would therefore have been obvious. In regard to claim 77, although it is not clear what a "lollipop configuration" means, as noted above, Firmin teaches a support stick plus additional confection and to modify Ref. N, for its art recognized and applicants intended function would have been obvious. The particular conventional additional confection (i.e., chewing gum), would have been an obvious matter of choice and personal

N.B.
NOT
INDEPENDENT
CLAIMS
72, 87
91, 95

EXHIBIT K, pg. 4

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N.B. ORIGINAL EXHIBIT PAGES ARE AVAILABLE IN APPEAL OF 11,903,722

11/903,722

(Kiely)

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This was a statement regarding a "material" as opposed to "parts" of a support. [emphasis added] (Exhibit B, pgs. 26 - 28) as "further including" was used to denote an added mess guard or drip guard, etc. Examiner was well aware of Applicant's disclosure of "composite material" and further made a restriction 5/2/2002 (09/641,410) among:

IVa - "composite material candy bar,"

IVb - "composite material cookie bar," and

IVc - "composite material granola bar." (Exhibit B, pg. 25) (Exhibit B, pgs. 22 - 24)

All independent claims of 72, 87, 91, and 95 were clear, concise, and not rejected under 35 USC Section 112, first paragraph 5/23/03 (Exhibit ^K~~B~~, page ¹~~8~~)

No rejections had been made under Section 112, second paragraph. (Exhibit ^K~~B~~, pages ¹~~8~~ and ²~~7~~, see consecutive OA page numbers 2, 3)

Musher had been considered as cited art under section 102. (Exhibit ^K~~B~~, pg. ²~~3~~, above; and 35 USC Section 103, Exhibit ^K~~B~~, pg. ³~~8~~)

All of Applicant's claims 72 - 95 were found to be novel under section 102, over Musher. (Exhibit B, page 7)

All of Applicant's independent claims 72, 87, 91, and 95 were found to be unobvious over the cited art to Musher under 35 USC Section 103, as are then all dependent claims. 5/23/03 (Exhibit B, page 8)

N.B. 5/23/2003 - Conclusion: All Claims 72-98 were found to be proper under section 112, novel under Section 102, and unobvious under Section 103 over the cited art to Musher by the Patent and Trademark Office at this time.

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→ 10/7/05 - the Patent and Trademark reintroduced the same overcome reference to Musher with the intent to deceive Applicant. **N.B. All cited art [emphasis added] had been overcome by Applicant prior to the sending of this Office Action.**

→ 10/16/2008 - Non-Final Office Action -

Objections to Specification - Applicant was required to cancel Applicant's patentable subject matter as a condition of the examination. (Exhibit B, page 13)

35 U.S.C. Section 112, first paragraph - Applicant was also required by the Patent and Trademark Office to cancel Applicant's subject matter as a condition of the application examination, (Exhibit B, page 14) which subject matter had been known to the PTO since 8/18/2000, upon filing, and as early as 1994 in the Disclosure Document Program, and which had already satisfied section 112. (Exhibit B, page 6).

→ 7/9/2009 - Final Office Action - Applicant was *again* required to cancel applicant's patentable subject matter. (Exhibit B, page 15)

Applicant was again intentionally required by the Patent and Trademark Office to cancel Applicant's patentable subject matter as a condition of the examination, under 35 U.S.C. Section 112, first paragraph, (Exhibit B, page 16) which subject matter had been known to the PTO since 8/18/2000, upon filing, and as early as 1994, above, in the Disclosure Document Program, and which had already satisfied all the requirements of section 112. (Exhibit B, page 6).

★ **N. B.** *All cited art* had been overcome by Applicant in the response to the Final Office Action of 3/9/2004. (See Exhibit B, pages 9, 10, i.e. *all cited art had been withdrawn*)

EXHIBIT K, pg 6

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→ N.B. The Patent and Trademark Office failed to state when claims are allowable 707.07(j) and allow all claims 72 - 98, as required. (Exhibit B, pg. 9, 10) The Office Action of 10/7/05 was clearly prejudicial. The Patent and Trademark Office knowingly and willfully reinserted the reference to Musher, without any valid difference in argument, and denied allowance, when it is documented that Applicant had already overcome the reference to Musher under both 35 USC Section 102 and Section 103. (Exhibit B, pages 7, 8) The Office continues to examine Applicant's claims as "composite support comprising two materials" instead of "composite material comprising two materials" without regard to Applicant's subject matter, as the Patent Office knew in the record. (Exhibit B, pgs. 29 - 32) (Exhibit B, pg. 5 and other prior mentioned exhibits)

→ N. B. Applicant had asked for assistance with the claims on 8/20/03 under MPEP 706.03(d) and 707.07(j) (Exhibit B, pg. 11) Applicant was told:

"It is noted that applicant has requested help from the examiner. Beside the fact applicant either has had some experience prosecuting applications or has had experienced help, as evidenced by the fairly accomplished communications, the Office provides help or makes suggestions relative to patentability, if the Office has discerned allowable subject matter.

As of now, this has not been the case. 3/9/04 (Exhibit B, pg. 12)

→ Applicant submitted that as of the time it was the case. [emphasis added] Applicant tried to show that this "was the case" and again sent in Applicant's disclosure documents, to the Patent and Trademark with evidence of Applicant's date of conception and reduction to practice of July 5,

→ 1994, Serial No. 357149, since Applicant's IDS, as filed, had been removed from Applicant's file.

EXHIBIT L, pg. 1

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It would have been obvious to provide chocolate or a moisture proof barrier on the support of Ref. N in view of the teachings of both Firmin and Jones who provide a support stick which can be edible with a chocolate coating.

Claim 82 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Ref. Q (Swiss 647394).

It would have been obvious to modify Ref. N and add a protective mess guard in view of Ref. Q which adds such an expedient for its art recognized and applicants intended function.

Claim 83 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Sueskind (2,832,708) and Parr (1,835,719).

It would have been obvious to modify Ref. N and add an edible drip guard to the support comestible in view of Sueskind and Parr, both of whom teach the drip guard for applicant's reason in applicant's environment.

Claim 84 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Kennedy (2464515).

It would have been obvious to modify Ref. N and provide for the support of more than one comestible as taught by Kennedy who teaches applicant's problem and solution.

Claim 85 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ref. N in view of Hart et al (6,054,158).

→ Claim 85 differs from Ref. N in the recitation of a means for supporting the comestible upright on its own. Hart et al teaches it was conventional to employ such a

EXHIBIT MMC
COMPOSITE

09/641,410

GAU 1794

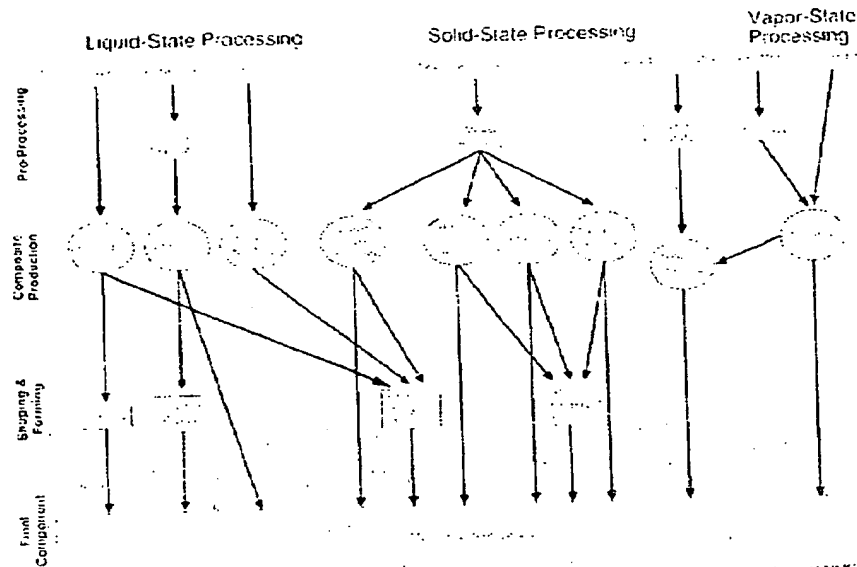
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A. Mortensen, C. San Marchi, H. P. Degischer

MMC-Assess - Thematic Network

Glossary of terms specific to Metal Matrix Composites MMC ASSESS EU Network, Topic 1: Processing.



1) GENERAL DEFINITIONS:

Composite A composite (or composite material) is defined as a material that consists of at least two constituents (distinct phases or combinations of phases) which are bonded together along the interface in the composite, each of which originates from a separate ingredient material which pre-exists the composite.

The essential elements of this definition are

- (i) composite refers to a material, as opposed to a structure or a component; as such a composite material is used for the fabrication of components of various shapes or functions, thus it should be distinguished from a wing or other structure made of several components bonded together, and from an electronic device or packaging structure made of layered materials (although one of the materials in the packaging could be considered a composite);
- (ii) the composite is produced via a physical combination of at least two pre-existing ingredient materials; this distinguishes a composite from other multiphase materials which are produced by bulk processes where one or more phases result from phase transformation: many "in-situ composites", such as directionally solidified eutectics or alloys from which a ceramic phase is precipitated, are thus considered to be alloys and not composites (even though their properties can be described using composite theory).

Hybrid composite: a composite that consists of at least three (as opposed to two) constituents (distinct phases or combinations of phases) which are bonded together at the atomic level in the composite, each of which originates from a separate ingredient material which pre-exists the composite (i.e., there are, at least three ingredient materials).

Volume 1

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Pg. 1

EAU 1794 KIELY

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Oct. 15, 1940.

A. MUSHER

2,217,700

FROZEN CONFECTION AND METHOD FOR MAKING IT

Filed July 1, 1939

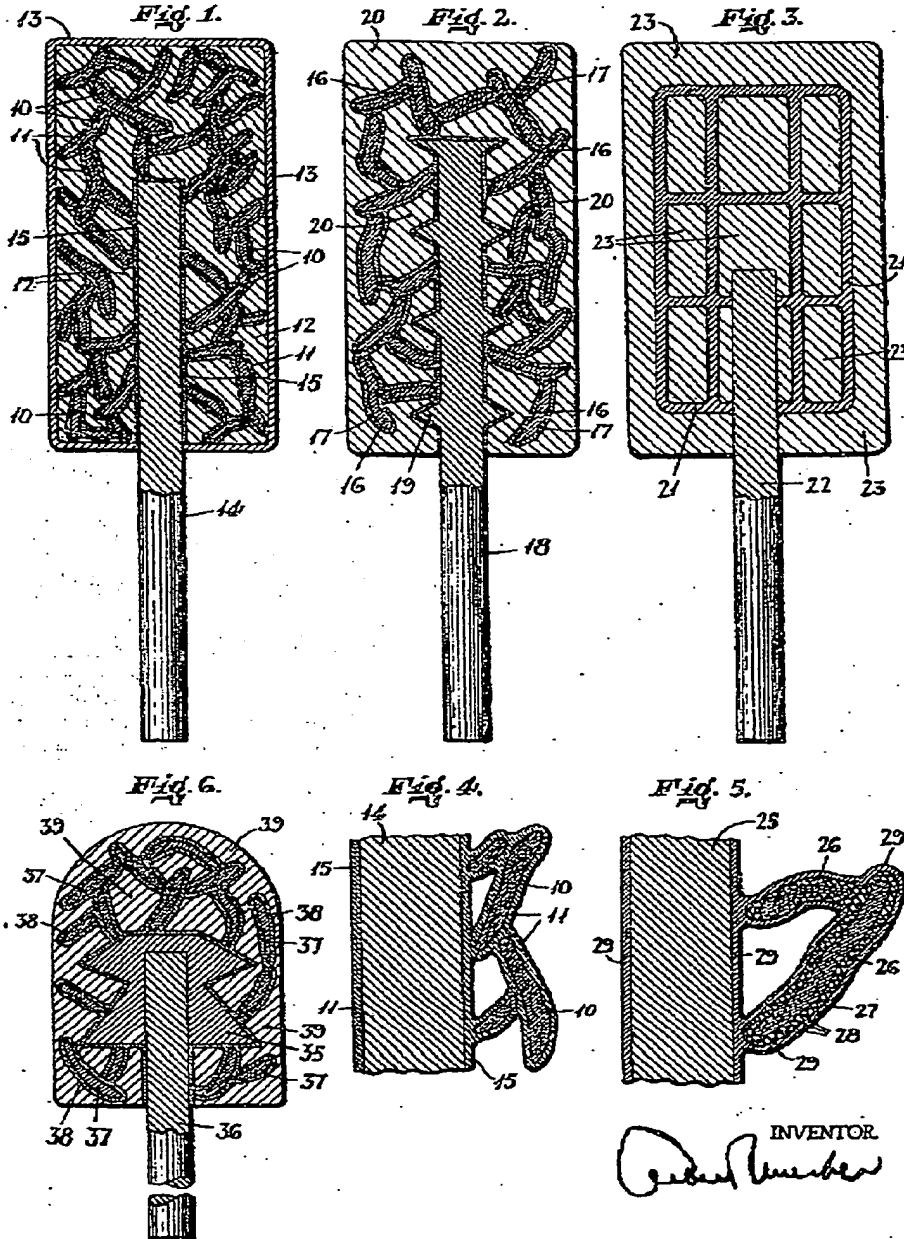


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GAO 1777

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pg. 2

Patented Oct. 15, 1940

2,217,700

UNITED STATES PATENT OFFICE

2,217,700

FROZEN CONFECTION AND METHOD FOR MAKING IT

Albert Musher, New York, N. Y., assignor to Musher Corporation, Elizabeth, N. J.

Application July 1, 1939, Serial No. 282,342

14 Claims. (Cl. 93-137)

This invention relates to a new confection, and to methods for producing it.

The object of the present invention is to provide a new confection product that they may be merchandised, sold, and consumed in the form of bricks or in other forms, or that they may be placed on a stick or other holder for novelty eating purposes.

Another object of this invention is to provide a framework structure which may be used as a much more durable foundation, support, or structure for ice cream or for products which harden, congeal or are frozen from a relatively fluid material into a relatively hardened form. These products may be sold in brick form, or they may be merchandised by attachment to a stick or other holder.

A further object of the present invention is to provide a means whereby the stick or other holder which is used in conjunction with ice cream or other frozen products, may be relatively solidly attached into the ice cream or other frozen material so as to eliminate in a substantial way the possibility for this stick or other holder to detach itself, or to slip out from the frozen product, particularly as the product softens or melts.

Still further objects and advantages will appear in the more detailed description set forth below, it being understood, however, that this more detailed description is given by way of illustration and explanation only and not by way of limitation, since various changes therein may be made by those skilled in the art without departing from the scope and spirit of the present invention.

In one embodiment of this invention there are used, for example, various ready prepared or precooked cereal products such as corn flakes, wheat flakes, shredded wheat, bran flakes and similar other cereal products or combinations thereof.

These ready-to-eat cereals are bound together into a durable structure by the use of a binding agent, which should have the characteristic of providing a sufficiently durable bond.

In one preferred embodiment of this invention, a flake product, such as corn flakes, may be used. These flakes, by virtue of their more rigid condition, supply a firmer framework, particularly when the product is to be used in conjunction with frozen products for the purpose of reinforcing the framework of the confection.

The flakes that are used should, for best results, be of a relatively heavy flake structure

rather than of a thin structure. This will produce increased strength and durability.

Also, preferably, the cereal flakes or the high starch structure pieces that may be used, are preferably toasted or baked so as to crisp or harden them. This not only produces additional strength but also it provides a product which has slower and less water absorption quality. This quality is of importance particularly where the structure is used with frozen materials, or with materials that have an aqueous content, and it is thereby desired not to have the aqueous materials seep into and soften these structure pieces.

Aside from crisping or hardening these materials by baking or toasting them, they may be otherwise dried, or they may even be fried, as in the case of materials such as potato chips, or they may be otherwise hardened in any of the usual procedures.

In another embodiment of this invention, shreds may be used, as for instance shreds such as shredded wheat. Also as a further embodiment, larger flakes, such as potato chips may be used, or dry melba toast, or other dry baked materials may be used. Or, it is possible to use various high starch materials which harden into a sufficiently durable structure in the form of flakes or in forms other than flakes, as for instance, in a lattice form, or in other shapes.

However, as noted herein, for preferred results, these products should be of a relatively hard or dry or crisp nature, and preferably of a relatively thicker nature rather than of a thin frail nature, so as to present a more durable or solid structure, particularly where this invention is to be used as a basis for frozen products or as a basis for any liquid products which congeal upon standing, cooling, etc., as for instance chocolate.

Further, in producing the frame or structure of this embodiment, hard sugar pieces may be used, as for instance in the form of ribbons, or flakes. Or, there may also be used hard fat which has been melted and shaped into the desired flakes or ribbons, or other forms, and then congealed in these required shapes and forms.

Not only a single type or variety of flake or structure piece may be used in the making of the unit structure, but various combinations of structure pieces may be used, as for instance combinations of corn flakes and sugar ribbons, or hard fat flakes and potato chips with or without shred strands, and so forth.

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US 2,217,700

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p938

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The flakes, or ribbons, or other structure pieces as for instance corn flakes, sugar ribbons, and so forth, that are used in this invention, should for many preferred cases, not be straight, but rather, they should be in a curved or bent or otherwise disjuncted or irregular or uneven form or condition so as to provide better anchorage qualities, or better adhesive foundations, or better structural strength, or other characteristics.

Nevertheless, there are some cases where relatively straight pieces of these structure flakes may be used. For instance, it might be desired for this structure to be composed of flakes, the greater part of which are running in one direction, at an angle, so as to support the frozen material within the structure, and so as to form various types of foundations.

Various shapes, and various forms, and various types of structure pieces may be produced so as to meet the specific purposes required. By the use of the structure pieces of various sizes, shapes, and forms, there may be produced various qualities and characteristics in the final unit. For instance, bulky structure pieces may be used for some specific purposes, as, for instance, where it is desired to have a smaller amount of frozen confection within the product. Also, relatively oval, or relatively round, or rounded pieces may be used, for instance, to provide more open space within the unit for the frozen confection than is provided by various types of flat flakes.

With reference to the binders or coating materials of this invention, two different types of binders or coating materials which may be used, although each operates differently and results in different effects, are sugar, and also edible fats. Also, other types of binding materials that may be used, are pectin, powdered skim milk, gelatin, vegetable gums, and similar materials, which, when mixed with proper amounts of aqueous material, produce the required binding or coating material.

The fats that are used should be relatively hard or rigid at room temperature, if the product is not used in conjunction with a frozen product. However, if the product is used in conjunction with a frozen product, it is generally preferred, for nutritional purposes, that the fat should be blended with other oils and/or fats, or should be adjusted so as to be hard or rigid at the chilled temperature. This permits the use of a fat which will melt or soften at body temperature so as to provide superior digestibility, but which, while it is serving the purpose of a coating or binder in the frozen confection will be of a relatively durable nature.

Examples of various fats that may be used in the various embodiments of this invention are olive oil, cottonseed oil, palm kernel stearin, coconut oil, coconut oil stearin, hydrogenated or naturally hard or plastic oils or fats, or various combinations of these or other types of fats and oils, so as to produce the fatty material of the required melting point or for other characteristics.

The sugar that is used in the embodiments of this invention, particularly for coating and binder purposes, may be of whatever type of sugar that is desired, so as to produce the characteristics required. For instance, where it is desired to increase the strength of the structure, or of the flakes, or other structure pieces, a comparatively hard, or vitreous-like sugar may be used. For example, molten cane sugar, barley sugar, etc.,

or generally, aqueous solutions of cane sugar, or of other types of sugar in concentrated form, may be used.

These hard or vitreous types of sugar have the advantage that they produce a substantially stronger structure, and they are of a slower dissolving nature so as to be less affected by the aqueous nature of the materials that are impregnated or filled into the unit structure. Of course, however, because of their relatively slower dissolving properties, they dissolve more slowly when placed in the mouth.

In those cases where it is desired to have a structure that will dissolve more rapidly, various non-crystallizable sugars or other types of quick dissolving sugars may be used. For example, sugars of this type may be glucose, honey, levulose, etc., or combinations thereof. Also a quickly dissolving sugar may be formed of a sugar material that is so made, as to be composed of a number of small crystals which are held together and which have many interstices, pores and openings in, or throughout, their crystallized structure.

Also, where desired, glycerine, or similar materials may be added to crystallizable sugars in order to produce water retaining or relatively non-crystallizable properties.

Further, where required, various combinations of sugars, whether of a crystallizable, or non-crystallizable, or other nature, may be mixed and used together in whatever proportions are required, in order to produce various desired characteristics.

In the embodiment of this invention, instead of using binders such as hard fat or sugar, in their natural form, products containing substantial quantities of either one or both of these, or other binder materials may be used.

The binder material, further, may consist of a cereal or starch paste, or it may be of relatively the same substance as the cereal material that is being used in making the structure. For instance, relatively thin strings made from wheat may be bound together with their own adhesiveness, while they are sufficiently soft, and, in a non-compacted form, for instance, this may be used in forming a unit structure, after they have been baked, dried, or otherwise hardened or crispened.

Also, these binding or coating materials may consist of various products, or combinations thereof. For example, a water-in-fat emulsion may be made by the emulsifying together of a sugar syrup in a hard fat, or, a powdered skim milk may be brought to a relatively fluid condition by mixing with an aqueous material, and this product then emulsified with the hard fat. Also, by using liquid oils or various other modifications of the oils, fats, or aqueous materials, an oil-in-water emulsion may be formed to provide required characteristics and to produce various specific results.

Also, where it is desired to give added strength to the flake or other structure pieces and also, so as to give the structure pieces protection against air and moisture, or further protection against moisture of the ice cream or similar material that is impregnated or filled into the unit structure, a hard fat or a similar water repellent material may be used to coat these structure pieces.

This water repellent coating material may further serve as the binding material, where this is desirable, or other materials may be used for the binder. For instance, a hard fat may be

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(U.S. 2,217,700)

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2,217,700

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used to coat the structure pieces, and then, the structure pieces or flakes may be mixed with the sugar binder or other binder, and these structure pieces compressed or molded together into the required shape.

One particular embodiment of this invention resides in incorporating, within the structure flavoring or food materials of a hygroscopic, powdery nature, or materials which tend to gum or cake when they come into contact with water or water-containing materials. For instance, in mixing the flakes or structure pieces of this invention with powdered milk, which is a hygroscopic material, and then using aqueous sugar syrup as a binder, this aqueous material would affect the hygroscopic nature of the powdered milk, and thereby, this would result in lumping, caking and hardening of these powdered milk particles so as to produce relatively disintegrable qualities in the final product. In the same way, if ice cream or other frozen aqueous material, is mixed into the structure, and thereby allowed to come into direct contact with the powdered milk, or similar hygroscopic materials, the conditions of lumping, caking or hardening would likewise follow.

However, it has now been found, that these hygroscopic materials as for instance, powdered milk, may be incorporated into a molten hard fat or into a similar water repellent material, and in this form they may be applied to the structure pieces. For instance, in the general embodiment of this procedure, the powdered milk and the molten hard fat are mixed together and the powdered milk is dispersed thoroughly in the molten hard fat. This fat-milk mixture is then sprayed, or coated, or otherwise applied to the flakes or structure pieces and is allowed to congeal thereon. These structure pieces are then in a condition whereby the hygroscopic materials will be relatively well protected from aqueous materials, and then, these structure pieces may be bound together with aqueous sugar syrup, or they may be mixed together with aqueous materials such as liquids or ice cream which may congeal thereon.

This coating of a fat or similar water repellent material, aside from providing for a method of applying hygroscopic materials, has many other advantages. For instance, this procedure results in structure pieces remaining crisp and hardened, notwithstanding the fact that aqueous materials are present in the unit.

Also, considerably increased strength is provided in the unit formation and in the formation of the flakes or structure pieces, so that when they are pressed together, they are not broken or crumbled so easily. Also, in handling or consumption, these entire units retain substantially more strength.

Still further by the use of a plastic or hard fat material, particularly if it is applied at a relatively high temperature as for instance from about 200° F. to 210° F., and allowed to remain at this temperature in contact with the food pieces for a period of time, there is a tendency for the fat to seep into the fibers or body of the flake or structure piece, so as to reduce the tendency towards cracking or crumbling of the structure pieces.

The flakes or similar materials which form the unit structure, after they have been mixed or coated, or otherwise combined with the binder material, are then molded or compacted together. It is preferable, if any compression or compact-

ing is used, to compact these structure pieces together rather lightly, so as to result in a product which has a large number of large openings throughout. This is, of course, an important embodiment that is accomplished by this invention, in that it provides a framework for the frozen confection, or similar confection, so as to produce a durable structure to act as the framework, but, at the same time it further provides an even larger amount of space within the unit structure in order to enable as much ice cream or other similar product to be impregnated or filled into the structure.

The flakes, or shreds, or laminations, or other structure pieces that are used in the structure, may have mixed with them, or coated, or otherwise applied or adhered to them, various flavoring or food materials as for instance powdered milk, cinnamon, powdered cream, cocoa, or more solid materials as for instance raisins, or nuts, or various essential oils, or other liquid flavoring materials. The binding material that binds these materials to the structure pieces may or may not be the same binding material that is used to bind the structure pieces together into the unit form. Also, if desired, the finished product, whether in the form of a non-frozen, or non-congealed product, or whether in the form of a frozen confection, may be coated or dipped into chocolate, or it may be covered or sprinkled with other flavoring materials, etc.

In preparing the structure of this invention in conjunction with frozen confections, or in conjunction with materials that are placed within the structure in relatively a liquid condition, and allowed to congeal thereon, the structure is first made by mixing the structure pieces, as for instance the corn flakes, potato chips, etc., with the binder material such as the molten hard fat, or the heavy sugar syrup. The sugar syrup may be heated to about 150° F., for instance, so as to thin it and thereby so as to provide for a thinner and more complete coverage, as for better adhesion at the contact points.

If molten hard fat is used as the binder, it should be allowed to congeal so as to harden, and thereby so as to hold the structure pieces together more durably.

If sugar is used as the binder, the unit structure, after the flakes or structure pieces have been molded together, may or may not be dried, depending upon the nature of the sugar material that is used. Generally, however, it should be dried, because the entire structure should be sufficiently firm so as to retain the required durability for dipping, or for otherwise applying the ice cream or other frozen confection.

The unit structure formations are then dipped into, or are filled with the relatively fluid or plastic material, such as the ice cream mix, and then this material with which it is filled or into which it is dipped, is then frozen or congealed within or on the structure. This procedure of filling or dipping should generally take place while the ice cream or base material is in a substantially fluid condition so as to substantially fill all of the spaces, interstices, and openings that are within the structure formation.

The flakes, shreds, laminations or the other structure pieces that are used in the making of the structure, may be coated with molten hard fat, molten chocolate, molten sugar, or with other similar flavor or food elements, which materials should thereafter congeal on these structure pieces. Thereupon after congelation and harden-

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ing of these materials, the liquid ice cream mix, for instance, is filled into the openings and spaces of the structure so as to result in a new and unusual product in which the interior portions contain chocolate laminations, or laminations, etc., of other flavoring materials. The use of these materials in this lamination or coating form, produce further strengthening quality to the unit formation, and also this use produces a new and unusual product from the standpoint of novel confection characteristics.

The general use of the products of this invention is in conjunction with base materials which, it is desired, should be present substantially predominantly. In other words, in the making of an ice cream confection, for instance, it is expected that the ice cream should be the predominant flavor element and that it should be the base material. In view of this, it is therefore desired that the unit structure of this invention should be of a form so as to permit the storage or retention within its own structure form, of substantially large amounts of the fluid or plastic material that is filled therein, and which is afterwards congealed or hardened.

For this reason it is of importance in the embodiment of this invention, where it is desired to provide as much space as possible for the predominant, base material, that the structure pieces which are used to form the basic structure should generally be of a relatively non-bulky form and they should present as little mass as possible. Therefore, products which are bulky, or swelled, or products which contain considerable air space within their own make-up, are generally not desirable.

Aside from the use of the unit structure, as herein described, for the purpose of holding the frozen or congealed material thereon and there- in, this structure, in various embodiments, also serves as a means for anchoring and more firmly holding the stick, or other holder within the frozen or hardened piece.

For instance, because of the melting quality of ice cream, and because of the fact that frozen materials develop softness rather quickly after they are taken from the freezer and while they are being consumed, there is a tendency for the stick which holds them, to slip out, before the entire ice cream or other frozen material has been consumed. This results in many obvious inconveniences and disadvantages.

However, by the formation of the unit structure as herein described, it is now possible to provide a frozen confection in which the stick is substantially more firmly and more securely held, and which will remain so, until practically the entire ice cream is consumed.

This is produced by having the stick or other holder firmly cemented or attached into or on the structure by the use of binding materials which may be the same or which may be different than the binding materials that are used to bind the structure pieces together. These binding materials that are used to hold the stick into the structure may be, for instance, molten sugar, or hard fat, or they may be powdered milk, vegetable gums, or pectin, in aqueous paste form, or they may be combinations of these or other materials.

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Example I

An example of one embodiment of this invention is to mix 200 grams of dry corn flakes together with 120 grams of glucose of about 40°

a stick placed within the unit structure to the extent of about one-third or one-half of the length of this unit structure.

This unit with the stick therein, is then allowed to dry at a temperature of 130° F. for instance, for a period of about 3 hours. Then further drying at room temperature for about 24 hours may take place if necessary.

After this structure has been dried, it is dipped into or otherwise filled with the confection mix 10 which is then congealed therein. In order to get as much of the liquid confection material as possible into the openings of the structure unit, this confection material should be made as liquid or as thin as possible, so that it will permeate throughout the entire unit and fill as many of the spaces as possible. One of the ways by which this may be done, for instance, may be to place the unit structure which is attached to the stick, into a mold and then to pour liquid raspberry ice mix, 20 for instance, over the product, so as to cover it, and then to subject this product to the freezing procedure.

Example II

Instead of placing the stick or holder within the structure piece of Example I while the product is being molded, the oblong or square or round unit structure may be dried without the stick. Then, after it is dried, a hole is made within the unit piece and the stick is inserted. Thereupon, a molten hard fat, or a molten sugar, or a paste mixture of powdered milk and water may be placed in the hole along with the stick so as to cement it to the unit structure. The binding material that is placed into the hole will attach itself to the stick and will also seep onto and around the other flakes or structure pieces, and thereby there will result a substantially firm anchorage of the holder within the confection. Of course, the binding material should be allowed to congeal or harden, after which the stick will be held in a very firm position.

Thereupon, the unit structure is filled or impregnated with the material which is then frozen or congealed therein.

Example III

There may be combined 80 grams of flakes or similar structure pieces, and 70 grams of hard vegetable fat of 115° F. melting point. The fat is melted and heated to 200° F. At this point the flakes are added into the molten fat and are mixed thoroughly therein in order to thoroughly coat these structure pieces.

This mixture is then placed into molds and some pressure is applied if this is desired. The product is then placed into a temperature of 50° F. in order that the fat may congeal and bind the flakes together.

After congealing has taken place, the unit structure may be filled with the liquid confection mix which is then hardened or frozen therein. Various flavoring materials, if desired, may be mixed with the molten hard fat, prior to the mixture with the flakes.

Example IV

There may be mixed together 70 grams of granulated cane sugar and 25 grams of water. This is heated to about 150° F., or until it becomes a syrup.

This syrup is cooled so that it will not substantially soften the flakes when it is mixed therewith. This syrup is then mixed with 50 grams of the flakes or similar structure pieces so as to thoroughly coat all of the flakes.

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This combined product is then molded and slightly compacted, if desired. The product then is placed at a temperature of 135° F. for about 4 or 5 hours in order to dry. After this, the product may have an air drying at room temperature for about 24 hours.

The cane sugar may have cinnamon, vanilla, or other flavoring materials contained therein, or a combination of liquid hard fat and chocolate powder, for instance, may be sprinkled over the unit structure.

A stick or holder may be placed within this structure as herein described. Dipping, coating, freezing, or other required procedures may follow.

Example V

There is mixed together 10 grams of powdered skim milk with 35 grams of hardened vegetable oil of 115° F. melting point. This mixture takes place by heating the hard fat to a temperature of 180° F. so as to melt it, and then mixing the powdered milk very thoroughly therein. At this point 50 grams of the flakes, for instance, are mixed into this fat combination and the product is completed as described in Example III above.

The stick or holder may be placed and fastened by adhesion within the unit structure after the structure is completed. Or, a piece of spear-shaped hard candy, which has first been attached to the stick in lollipop form, is imbedded into the flake-fat-milk combination while it is being molded.

In the embodiment of this invention, the unit structure to which is attached the stick or holder, need not be of relatively the same size as the entire frozen or hardened piece so as to be present in substantially the entire hardened piece. Instead, the unit structure may be of sufficient size to be included within only about one-third, or one-half, or within even smaller parts of the frozen piece. In this way, the structure which has been reduced in size, will serve as a firm base or foundation for the stick, but will provide even greater space for the ice cream or other frozen confection that is used therewith. In cases such as this the structure may be in the form of a horizontal strip or block, or it may be vertical, or it may be in the form of an angle joined at the stick, or it may be in the form of a cross, or a circle, or in various other shapes or forms so as to provide various characteristics, as for instance a more durable foundation for the hardened confection.

In a still further embodiment of this invention, the stick may first be made so as to have, at the end thereof, a piece of candy, and particularly a piece of hard candy, as for instance, in the form of a lollipop. This may then be placed into the flakes or structure pieces, while they are being molded, for instance, and in this way, the candy piece will serve as a means by which the stick may be held more firmly within the unit structure.



the hard fat so that the hard fat will soften. Then, thereafter, the fat is allowed to congeal by placing the entire unit piece into a cooler, or it may be further hardened by the ice cream or other frozen material which is then frozen therein, or by various other methods. This will result in the hard fat becoming soft or liquid at the warmer temperature so as to form an adhesion

agent between the candy piece and the structure pieces, so as to secure a firm adhesion upon cooling.

Also, other binding agents may be used in place of the hard fat. However, with other types of binders, drying or heating may be necessary to have the candy adhere, rather than a cooling procedure, as in the case of fat.

Likewise, this procedure may be used even when there is no candy on the stick, in which case, a sufficient amount of the binder may be applied to the stick, so that when it is placed within the structure, and this binder is then softened sufficiently, and then hardened or congealed, there will be produced a product in which the stick is firmly cemented to the structure pieces, and thereby becomes well founded in the entire structure.

In various cases, also, the candy at the end of the stick may be spear-shaped or further shaped so that the candy will form an obstruction so as to further increase the hold or grip that it has within the structure unit.

The candy material which is attached to the stick, may be not in just one piece, but it may be in ribbon form, particularly as curved ribbons, or it may be in the form of bent or curved flakes for instance, or it may be in various other forms so as to more rigidly hold the stick on to the unit structure and thereby so as to hold it securely within the ice cream or similar block. Also, in some cases, the hard candy ribbons may take the place of straight ribbons or flakes which are fastened or melted on to the stick, and which are placed in a position horizontal to the stick.

In order to facilitate the entrance of the liquid or plastic frozen confection into the interstices and spaces in the unit structure, and so as to fill these spaces as much as possible, it is desirable in many cases to evacuate the air from these spaces by such methods, as for instance, drawing the liquid confection into these spaces by vacuum. In a process such as this, the air may be evacuated from between these spaces, and then the vacuum continued, in order to draw the liquid material therein.

Also, with reference to the stick or holder that is used in these confections, this stick may be of the usual type, such as a heavy rope material, or a wooden stick, and so forth. In some cases, where desired, the entire stick, including the holder, may be of an edible material so that it all may be consumed. Also, it is possible to have all, or part of the unit structure within the frozen confection baked on the stick so as to provide a strong adhesion to the stick. Various other combinations of the methods herein described may be used with reference to the holder for the frozen confection, or with reference to its adhesion to the unit structure therein.

In the accompanying drawing are shown diagrammatically some of the embodiments of the present invention to which the present invention is in no way restricted, the illustrations



views of the unit structure, which may be utilized according to the present invention.

Figures 4 and 5 are enlarged views showing a form of coating and surfacing of the structure pieces and the manner of their attachment to the stick.

Figure 6 is a further longitudinal sectional

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view showing an alternative form illustrating the method by which the stick may be locked in the frozen confection construction.

Referring to Figure 1 the skeleton framework may be formed of a plurality of dried, crisp food flakes or chips 10, and which for example may be corn flakes, rice flakes, potato flakes, or various other dried, toasted, roasted or prepared food products, preferably in flake form. These flakes may be covered with hard fat or with sugar or with other suitable binder materials 11 and then molded or formed with or without the stick 14. Each of the flakes 10 in this illustration is provided with a coating 11 and in the embodiment shown, the stick 14 is afterwards inserted and caused to hold itself in position by an edible cement 15 which, for example, may be powdered milk made into an aqueous paste, or a hard fat, or even a sugar syrup.

After the product has thus been formed, the interstices or recesses between the flakes 10 may be filled with a liquid material 12 such as liquid ice cream mixture, which may then be frozen in position to substantially fill all of said recesses following which the entire article may be coated with chocolate, as designated at 13.

The structure of Figure 1 will not readily fall away from the stick, nor will the ice cream readily fall off the stick or drip upon the person eating it. The flakes tend to form an insulating casing for the ice cream. When the air is evacuated from the framework before filling it with ice cream, the ice cream will keep better and apparently will retain its desired flavor for a longer period of time.

The stick 14 may, if desired, be made of wood or rope or some suitable edible or inedible material.

In Figure 2 the framework or skeleton is made up of a series of flakes or other structure pieces 16 which may be connected together by a sugar or fat coating 17, for instance.

The stick 18 may be of the same material as the enlargements 19, and this entire stick may either be of wood or of other similar materials, or it may be of an edible baked or toasted product. Still further, the enlargements together with the major portion of the stick within the confection may be of the hard, crisp food material, and may be baked on the wood stick. These enlargements which are firmly held within the unit structure comprising flakes or other structure pieces, enable substantially increased retention of the stick within the frozen confection. The liquid confection mix 20 may then be filled within the open spaces of the flakes, and frozen therein.

If desired, the flakes of Figure 2 may be eliminated entirely in which event the enlargements 19 will serve to more firmly hold the stick within the confection, although not as well as when the flakes are present. Also, the stick may be a regular wooden stick or other holder which is firmly joined to the enlargements 19 by adhesion with hard fat, sugar syrup, or by being baked thereon.

In the embodiment of Figure 2, the stick may be molded in position with the structure pieces, while these structure pieces are being molded together. The enlargements 19 will then be held firmly in position and will join firmly with the adhesive coating 17.

In the embodiment of Figure 3 a dough or cereal product 21 may be baked on the stick 22. This will provide the grille or latticework formation 21, attached to the stick 22. The frozen con-

fection 23 is then placed therein and frozen within and over this grille formation.

In Figure 4 is shown the enlargement of a portion of one embodiment illustrating the attachment of the flakes 10 to the stick 14. It will be noted by reference to Figure 4 that the adhesive coating 11 whether sugar or fat or a combination thereof extends substantially continuously over the flakes 10 and also over the wall of the stick 14 so that there is a permanent and satisfactory junction.

In Figure 5 is shown an internal construction similar to that of Figure 4 in which, however, the flakes 26 are coated with hard fat 27 which carries a hygroscopic powdered material 28.

As shown in Figure 5, the flakes 26 are provided with a fat coating 27, carrying the hygroscopic powdery material 28. For example, this may be powdered milk. The sugar binder 28 extends over the fat coating and also over the stick 25 to form a substantially continuous binding.

In Figure 6 is again shown another embodiment in which the solid piece structure 25, has molded therein or rigidly attached thereto a stick 36. This structure 35 will lock the stick 26 in position so that it cannot be readily moved from the flake structure made of the flakes 31 bound by the binder material 32, through which flakes is interspersed the frozen confection 33.

The structure 25 may be made of a hard candy or of sugar, or of a crisp, baked product and it will assure a firm junction and union of the stick 36 with the flake structure, so as to desirably hold the stick within the frozen confection.

What I claim is:

1. A frozen confection having extended thereinto a hand holder member, said hand holder member being anchored within said frozen confection by attachment to a structure which is contained at least within a portion of the frozen confection, said structure comprising a plurality of substantially rigid food pieces bound together by an edible adhesive material, said structure having intercommunicating recesses extending throughout, and said intercommunicating recesses being substantially filled with the frozen confection.

2. A frozen confection having contained therein a structure formed of a plurality of substantially rigid food pieces bound together by an edible adhesive material, said structure having intercommunicating recesses therein, and said intercommunicating recesses being substantially filled with the frozen confection.

3. A frozen confection having contained therein a structure formed of a plurality of substantially rigid food pieces bound together by an edible adhesive material, said structure having intercommunicating recesses therein, and said intercommunicating recesses being substantially filled with a frozen material, said food pieces being substantially coated with a fatty water repellent material.

4. A frozen confection having contained therein a structure formed of a plurality of substantially rigid food pieces bound together by an edible adhesive material, said structure having intercommunicating recesses therein, said intercommunicating recesses being substantially filled with a frozen material, and said food pieces having coated thereon a water repellent material, said water repellent material being a fat, and said fat containing therein and substantially encompassing a material that tends to cake upon contact with water.

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5. A frozen confection having contained therein a structure formed of a plurality of substantially rigid food pieces bound together by an edible adhesive material, said structure having intercommunicating recesses therein, said intercommunicating recesses being substantially filled with the frozen confection, and said food pieces containing thereon a fat material as the bonding or coating material, said fat material being relatively soft at body temperature so as to facilitate the digestion thereof, but being relatively hard at the chilled temperature of the frozen material so as to have substantially good coating and binding quality.

6. A frozen confection having extended thereinto a hand holder member, said hand holder member being anchored within said frozen confection by attachment to a structure which is contained at least within a portion of the frozen confection, said structure comprising a plurality of substantially rigid food pieces bound together by an edible adhesive material, said structure having intercommunicating recesses extending therein, said intercommunicating recesses being substantially filled with the frozen confection, and said hand holder member having an obstruction thereon, said obstruction tapering out of the hand holder member and into portions of the structure so as to more firmly hold and retain said hand holder member within the frozen confection.

7. A process of making a frozen confection, said process comprising providing a plurality of

relatively rigid food pieces, binding them together with an edible adhesive binder so as to leave communicating recesses substantially between them, and then providing a hand holder member to extend into this structure, providing additional binding material on the portion of the hand holder member that is extended into the structure, and then filling the interstices between the food pieces with the frozen confection in its relatively liquid form, and then providing for the containing of the structure of the bound food pieces within the frozen confection, and then freezing so as to result in the frozen confection being in a frozen condition within the interstices of the structure as well as on the outside of the structure.

8. The frozen confection of claim 2, the edible adhesive material being a hard fat.

9. The frozen confection of claim 2, the edible adhesive material being a hard sugar.

10. The frozen confection of claim 2, the rigid food pieces being crisp cereal flakes.

11. The frozen confection of claim 2, the rigid food pieces being sugar flakes.

12. The frozen confection of claim 2, the rigid food pieces being corn flakes.

13. The frozen confection of claim 2, the frozen confection being ice cream.

14. The frozen confection of claim 4, the material tending to cake upon contact with water being powdered milk.

ALBERT MUSER.

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11/903,722

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(ii) Related Appeals and Interferences:

The above application 11/903,722, Method of Supporting a Frozen Comestible, is a division of application 09/641,410, "Edible Supports for Comestibles with Optional, Edible Mess Guards and Drip Guards," filed August 18, 2000 (Status: Pending Petition for Review by Office of Petitions).

- 1) **10/183,074, Edible Malleable Supports for Comestibles with Optional Mess Guards and Drip Guards - filed - Appeal was Filed** (co-divisional of application 11/903,722, above)

An appeal was filed regarding co-divisional application 10/183,074, Edible Malleable Supports, on 12/21/2005, (now abandoned). Result: The prosecution had been reopened. The scope of coverage of the claims of this application is included in the remaining existing application(s). (Exhibit A, page 1)

The inclusion of reference to parent application SR No. 09/641,410 is submitted as proper under the following: 1205.02 Appeal Brief Content [R-8] - 1200 Appeal

37 CFR 41.37(c) (1) merely specifies the minimum requirements for a brief, and does not prohibit the inclusion of any other material which an appellant may consider necessary or desirable, for example, a list of references, table of contents, table of cases, etc. a brief is in compliance with 37 CFR 41.37(c)(1) as long as it includes items (i) to (x) in the order set forth.

Applicant respectfully submits that the subject matter of Parent Application SR 09/641,410,

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Edible Supports for Comestibles is closely related to the above application under appeal and may be related to the outcome of this appeal.

2) 09/641,410 Edible Supports for Comestibles with Optional Mess Guards and Drip Guards

Related proceeding under 37 CFR 41.37(c)9(I) (ii)

Petition Filed under US 37 CFR 1.181 to the Director of Patents and to the Office of Petitions for 09/641,410 (parent of the above application)

N. B. (Applicant had sent a petition to the Office of Petitions on December 16, 2010. (Exhibit A, page 2) This petition, which was addressed to the Office of Petitions, was not forwarded to the Office of Petitions by the Patent and Trademark Office but sent to the Technology Department. (Exhibit A, page 3, circled date) Applicant had to send another petition on December 29, 2010, specifically addressed to Mr. Brian Brown in order to have it delivered to the Office of Petitions (Exhibit A, page 3 - arrow)

The Rejection of Applicant's Claims in Parent 09/641,410 Was Overcome with Respect to Musher (US 2,217,700) on 5/23/2003

All rejections of Applicant's claims in 09/641,420 had been overcome with respect to Musher on 5.23/2003.

Furthermore, all cited art had been overcome by Applicant in Applicant's response to the Final Office Action of application 09/641,419, Title: Edible Supports for Comestibles on

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3/9/2004. Thus, Applicant's claims were patentable over all cited art and should have been allowed by the United States Patent and Trademark Office, but were not.

The relied upon reference:

Musher is the same and sole cited art used to reject all claims of the above application, as well as the Parent Application SR No. 09/641,410. Musher constructed a: Frozen Confection and Method for Making It. (Title) Musher constructed an edible framework structure of edible flakes and ready to eat cereal pieces which holds ice cream within interstices made by the cereal flakes, which is completely frozen. (Exhibit - Patent to Musher - Example I, II, III, all claims, all embodiments, figures 1-2, 4-6). Musher teaches that he constructs a durable structure (pg. 1, col. 1, ll. 44) using structure pieces. (Pg. 2, col. 1, l. 22) Musher's edible structure is a structure made of many small parts.

8/18/2000 - The PTO was aware as of the day application 09/641,410 was filed that Applicant's support for a frozen comestible comprised "a composite [material]." A search was done on 8/18/2000 exclusively for class 426, and subclasses 90, 91, 134, and 132, in which "a composite" is classified. Thus, the Office was aware of Applicant's subject matter. (Exhibit B, pages 1, 2, 2A specification Butterfinger, Snickers, Milky Way, Kudos, Keebler Fudge Sticks)

N. B. Applicant's IDS including Applicant's Date of Conception: Applicant's proof of date of conception and reduction to practice of 1994, (SR 357149); 1996 (SR 403049); 1999 (SR 455819); stamped by the USPTO were removed from Applicant's sent documents 8/18/2000.

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(Exhibit B, page 1 (see: Applicant's IDS is not there); (Exhibit B, page 20 - Applicant's Transmittal Form, see listing #10, Applicant filed an IDS on date of filing 8/18/2000); (Exhibit B, page 21 - Applicant's postcard listed Applicant's IDS).

(See: Chan 6,177,110, issued January 23, 2001) below.

Applicant's last drawing sheet 19/19 was also removed from Applicant's sent documents, (Exhibit B, pages 20, 21 Applicant's 19 sheets of drawings.)

5/23/2003 - The reference to Musher (US 2, 217,700) (1940) had been considered in the examination of 09/641,410, 5/23/03. (Exhibit B - page 3, 3 cont. - Patent to Musher US 2,217,700) Notice of References Cited, 4th entry (D))

Claims 72 to 98 had been considered as pending 5/23/03 (Exhibit B, page 4)

The Patent and Trademark Office was aware that Applicant's support for a frozen comestible comprised a "composite" [material] at the time of the first Office Action on the merits, as would a person having ordinary skill in the art having read Applicant's specification, which recited Snickers, Milky Way, Baby Ruth, Twix, etc., and original claims 6, 19-23, (Exhibit B, pgs. 22 - 24) which recited "composite material." (Exhibit B, page 5 - 2nd paragraph, line 6-7: (i.e. consistent with the specification) (Restriction 5/2/02 - Exhibit B, pg. 25)

Examiner stated:

"In fact, since the edible support is disclosed as being a composite, how can it be homogenous? The two are mutually inconsistent..." and

"In regard to claim 76, claim 76 can be construed to recite that the edible support comprises one or more elements a through m and particulate matter and a homogenous comestible." (Office Action - 5/23/03) (Exhibit B, page 5)

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This was a statement regarding a "material" as opposed to "parts" of a support. [emphasis added] (Exhibit B, pgs. 26 - 28) as "further including" was used to denote an added mess guard or drip guard, etc. Examiner was well aware of Applicant's disclosure of "composite material" and further made a restriction 5/2/2002 (09/641,410) among:

IVa - "composite material candy bar,"

IVb - "composite material cookie bar," and

IVc - "composite material granola bar." (Exhibit B, pg. 25) (Exhibit B, pgs. 22 - 24)

All independent claims of 72, 87, 91, and 95 were clear, concise, and not rejected under 35 USC Section 112, first paragraph 5/23/03 (Exhibit B, page 6)

No rejections had been made under Section 112, second paragraph. (Exhibit B, pages 6 and 7, see consecutive OA page numbers 2, 3)

Musher had been considered as cited art under section 102. (Exhibit B, pg. 3, above; and 35 USC Section 103, Exhibit B, pg. 8)

All of Applicant's claims 72 - 95 were found to be novel under section 102, over Musher. (Exhibit B, page 7)

All of Applicant's independent claims 72, 87, 91, and 95 were found to be unobvious over the cited art to Musher under 35 USC Section 103, as are then all dependent claims. 5/23/03 (Exhibit B, page 8)

N.B. 5/23/2003 - Conclusion: All Claims 72-98 were found to be proper under section 112, novel under Section 102, and unobvious under Section 103 over the cited art to Musher by the Patent and Trademark Office at this time.

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10/7/05 - the Patent and Trademark reintroduced the same overcome reference to Musher with the intent to deceive Applicant. **N.B. All cited art [emphasis added] had been overcome by Applicant prior to the sending of this Office Action.**

10/16/2008 - Non-Final Office Action -

Objections to Specification - Applicant was required to cancel Applicant's patentable subject matter as a condition of the examination. (Exhibit B, page 13)

35 U.S.C. Section 112, first paragraph - Applicant was also required by the Patent and Trademark Office to cancel Applicant's subject matter as a condition of the application examination, (Exhibit B, page 14) which subject matter had been known to the PTO since

8/18/2000, upon filing, and as early as 1994 in the Disclosure Document Program, and which had already satisfied section 112. (Exhibit B, page 6).

7/9/2009 - Final Office Action - Applicant was *again* required to cancel applicant's patentable subject matter. (Exhibit B, page 15)

Applicant was again intentionally required by the Patent and Trademark Office to cancel Applicant's patentable subject matter as a condition of the examination, under 35 U.S.C. Section 112, first paragraph, (Exhibit B, page 16) which subject matter had been known to the PTO since 8/18/2000, upon filing, and as early as 1994, above, in the Disclosure Document Program, and which had already satisfied all the requirements of section 112. (Exhibit B, page 6).

N. B. *All cited art* had been overcome by Applicant in the response to the Final Office Action of 3/9/2004. (See Exhibit B, pages 9, 10, *i.e. all cited art had been withdrawn*)

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N.B. The Patent and Trademark Office failed to state when claims are allowable 707.07(j) and allow all claims 72 - 98, as required. (Exhibit B, pg. 9, 10) The Office Action of 10/7/05 was clearly prejudicial. The Patent and Trademark Office knowingly and willfully reinserted the reference to Musher, without any valid difference in argument, and denied allowance, when it is documented that Applicant had already overcome the reference to Musher under both 35 USC Section 102 and Section 103. (Exhibit B, pages 7, 8) The Office continues to examine Applicant's claims as "composite support comprising two materials" instead of "composite material comprising two materials" without regard to Applicant's subject matter, as the Patent Office knew in the record. (Exhibit B, pgs. 29 - 32) (Exhibit B, pg. 5 and other prior mentioned exhibits)

N. B. Applicant had asked for assistance with the claims on 8/20/03 under MPEP 706.03(d) and 707.07(j) (Exhibit B, pg.11) Applicant was told:

"It is noted that applicant has requested help from the examiner. Beside the fact applicant either has had some experience prosecuting applications or has had experienced help, as evidenced by the fairly accomplished communications, the Office provides help or makes suggestions relative to patentability, if the Office has discerned allowable subject matter.

As of now, this has not been the case. 3/9/04 (Exhibit B, pg.12)

Applicant submitted that as of the time it was the case. [emphasis added] Applicant tried to show that this "was the case" and again sent in Applicant's disclosure documents, to the Patent and Trademark with evidence of Applicant's date of conception and reduction to practice of July 5, 1994, Serial No. 357149, since Applicant's IDS, as filed, had been removed from Applicant's file.

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(Exhibit B - pgs. 20, 21, 1) Applicant's documents showing date of conception and reduction to practice was again taken from Applicant's filed documents and returned to Applicant as "canceled." (Exhibit B, pg. 12A) Applicant had to Petition twice.

Chan (6,177,110) was NOT prior art of Applicant. As stated by Examiner, Laskey (1566,329) "did not disclose a composite as a support." Van Dueren's (Swiss 649,197) tubular cookie sheath and an added filling had "parts," which could not be a candy support. Examiner admitted that Laskey did not disclose a composite as a support and Chan was not prior art. Musher, Tezuka, Firmin and Jones, had all been considered (Exhibit B, pg. 3) and were not relied upon for the rejection; (Exhibit B, pgs. 7 -8). There was no motivation to combine Van Duren with Laskey who did not disclose a support, (agreed by Examiner) only a candy. "This was the case." ((Exhibit B, pg. 12B)

Applicant furthermore was refused assistance with the claims on the basis of "...applicant either has had some experience prosecuting applications or has had experienced help,...". (Exhibit B, pg. 12) This was craftily determined by the Patent and Trademark Office upon Applicant's first response to the Office Action on the merits. [emphasis added]

It is of Applicant's understanding that *all applicants, whether they are represented, or pro se*, are entitled to assistance under MPEP 706.03(d) and 707.07(j). The Patent and Trademark Office did not assist Applicant with patentable subject matter but continued examination of the application with prejudice and intent to deceive Applicant. (Reinserted Musher with no genuine argument)

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Assistance under these sections is given to licensed professionals/attorneys, as early as their response to the first Office Action on the merits. This can be seen on Public PAIR.

It was also seen fit of the Office to intentionally change the words "patentable subject matter" of MPEP 707.07(j) to: "if the Office has discerned allowable subject matter" in order to deny Applicant assistance.

The Patent and Trademark Office continued to knowingly manipulate Applicant's claims and send improper Office Actions based upon:

"'composite support' comprising two constituent materials,"

or the Office truncated the independent claims and rejected the claims based upon Musher having two "constituent materials." This is all on the record.

The Patent and Trademark Office has unethically and continually worked to remove the limitation of "material" from Applicant's claims. The Patent and Trademark Office actually required Applicant to cancel Applicant's patentable subject matter under 35 U.S.C. 112, first paragraph. (Exhibit B, pg. 14) It is evident that this then would allow the Patent and Trademark Office to use 35 U.S.C. Section 102 against Applicant for "composite support" to then strip Applicant of which Applicant is entitled to by this very law.

The Patent and Trademark Office has unethically manipulated 35 U.S.C. section 112, first paragraph, in order to unethically use 35 USC Section 102 of the law to deny Applicant a patent.

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The Office specifically stated that Applicant's subject matter of "a composite" was understood and "said so." [emphasis added]

"In fact, since the edible support is disclosed as being a composite, how can it be homogenous?" (Underscore written by Examiner!) 5/23/03 (Exhibit B, pg. 5)

This is the denial of a fair and unbiased examination. Applicant submits that this serious misuse of the law and is blatant intent to defraud Applicant, which is all well documented. Prejudice is truly at the heart of this examination and the examination of its divisional applications.

In these many pages, Applicant has only provided the tip of the ice berg of evidence of prejudice directed toward Applicant, including objections and rejections that would never have been sent to a licensed professional.

Applicant had paid for and was denied the right to a fair and unbiased examination of Applicant's patent application under the law, which the Patent and Trademark Office willfully undertook and determined was enabled and definite under 35 USC Section 112, first and second paragraphs. (Exhibit B, page 6)

Applicant respectfully submits that the examination of Applicant's application 09/641,410 is wrought with prejudice. Applicant respectfully requests that Applicant be given the opportunity to amend the claims of this application in a new and unbiased non-final Office Action and that the claims be allowed for the full term allowed of 20 years, as the claims are both novel under 35 U.S.C. Section 102, which are also unobvious under U.S.C. Section 103 over all cited art and

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their combinations.

EXHIBIT L, pg. 2 ● 09/641,410 GAU 1774 ● 5/23/03 KIELY 161

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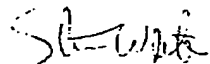
→ means/support and to modify Ref. N and provide self-supporting capability for its art recognized and applicants intended function would therefore have been obvious.

Any inquiry concerning this communication from the examiner should be directed to Steven Weinstein whose telephone number is 703-308-0650. The examiner can generally be reached on Monday-Friday 7:00am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is 703-308-0661.

S. Weinstein/mn
May 6, 2003


STEVE WEINSTEIN
PRIMARY EXAMINER 1761
5/23/03